The Myth of Presidential Impoundment Power

The historical record is clear: the president has no inherent power to refuse to spend funds appropriated by Congress.

MARCH 2025

Protect Democracy

Protect Democracy is a nonpartisan, nonprofit organization dedicated to preventing American democracy from declining into a more authoritarian form of government.

©2025 Protect Democracy

This paper was authored by Michael Angeloni, William Ford, Conor Gaffney, Jim Gilligan, and Alex Tausanovitch, with contributions from Arash Abbas and Genevieve Nadeau.

Protect Democracy is deeply grateful for the expertise provided by scholars and practitioners whose work and reviews helped shape this paper, including Matthew Lawrence, Eloise Pasachoff, Zachary Price, Raquel Spencer, and Adam Wilson. Nevertheless, Protect Democracy takes sole responsibility for the content of this paper and the attached appendix. Any errors are our own.

This publication is available online at:
protectdemocracy.org/impoundment-myth

Suggested citation: Protect Democracy, *The Myth of Presidential Impoundment Power* (Mar. 2025), protectdemocracy.org/impoundment-myth

Please direct inquiries to:
press@protectdemocracy.org

Cover photo credits: Jefferson: White House Historical Association; Roosevelt: Chronicle/Alamy Stock Photo; Nixon: Glasshouse Images/Alamy Stock Photo; Trump: DOD photo by Navy Petty Officer 1st Class Dominique A. Pineiro; all other photos Shutterstock

The Myth of Presidential Impoundment Power

Introduction 3

Congress's Power of the Purse: Constitutional Text, Structure, and Case Law 4

- Constitutional Text and Structure 5
- Federal Case Law 6
- Contemporary Ratification of *Kendall* and Nixon-Era Cases 9

Executing Congressional Appropriations: Correcting Mischaracterizations of the History of Presidential Impoundments 12

- Evaluating Practice-Based Constitutional Arguments 13
- Understanding Different Categories of Impoundments 14
- Correcting the Historical Record 17

Conclusion 36

Appendix: A History of Presidential Impoundments A1

I. Introduction

Throughout American history, Congress, not the president, has had the ultimate power to determine how government funds are spent. Few principles are as fundamental to the structure of government enshrined in the Constitution.

And yet, the current president and senior officials now serving in the executive branch have asserted that the president has the constitutional power to refuse to spend — that is, "impound" — funds appropriated by Congress. Not only is this view incorrect, it represents an extreme departure from over 200 years of constitutional history and practice. This paper shows that nothing in the Constitution's text and structure, federal case law, or American history supports the existence of a presidential power to impound. To the contrary, these sources of authority make clear that Congress, not the president, holds the power of the purse.

After addressing founding principles and applicable law, the lion's share of the paper is devoted to correcting mischaracterizations of the history of presidential impoundments — in particular those made by the Center for Renewing America (CRA),[1] which served until recently as a home to the main proponents of a purported presidential power to impound.[2] We summarize the appendix attached to this paper,[3] which analyzes every example CRA offers in support of the claim that an inherent presidential power to impound has been widely accepted and acted upon throughout American history.[4] We demonstrate that, contrary to CRA's broad claims, there is no inherent presidential power to impound.

[1] Russell Vought, who serves as the director of the Office of Management and Budget (OMB), founded CRA. Mark Paoletta, now the OMB general counsel, was a senior fellow there.
[2] Mark Paoletta et al., *The History of Impoundments Before the Impoundment Control Act of 1974* (June 24, 2024) ("CRA History"), https://tinyurl.com/bdedyam6.
[3] Citations to the appendix begin with the letter "A," followed by the page number (e.g., "A1-A5").
[4] For a more detailed explanation of how the appendix was assembled, see *infra* at pg. 17-18.

II. Congress's Power of the Purse: Constitutional Text, Structure, and Case Law

The Constitution gives Congress, and Congress alone, the power of the purse. Congress "commands the purse," as Alexander Hamilton wrote, holding the power to prescribe what funds may be drawn from the Treasury and how those funds will be spent through legislation.[5] In contrast, the president has no constitutional authority over federal spending.[6] His role is simply to ensure that spending laws are "faithfully executed."[7]

> "Where the purse is lodged in one branch, and the sword in another, there can be no danger...."
>
> **ALEXANDER HAMILTON**

Separating the power of the purse from the executive power is at the foundation of the Constitution's separation of powers.[8] By making the executive branch dependent on Congress to fund the operations of government, the Constitution checks the considerable powers given to the executive and prevents the aggrandizement of those powers, thereby addressing the founders' central concern of a tyrannical executive. "Where the purse is lodged in one branch, and the sword in another, there can be no danger," said Hamilton.[9] The purse is "that powerful instrument" for "reducing ... all the overgrown prerogatives of the other branches of the government," wrote James Madison.[10]

---

[5] The Federalist No. 78, https://tinyurl.com/mr3mh7an.
[6] *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 420 (2024) ("Our Constitution gives Congress control over the public fisc."); *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018) ("The United States Constitution exclusively grants the power of the purse to Congress, not the President.").
[7] U.S. Const. art. III, § 3.
[8] Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1344 (1988), https://tinyurl.com/3p5t73ae ("This empowerment of the legislature is at the foundation of our constitutional order.").
[9] 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 349 (Jonathan Elliot ed., 1836), https://tinyurl.com/3tnneueu.
[10] The Federalist No. 58, https://tinyurl.com/5t3kwd6d.

So fundamental was this idea of separating the purse and the sword that "[b]y the time of the Constitutional Convention, the principle of legislative supremacy over fiscal matters engendered little debate and created no disagreement."[11] The early American colonial assemblies — informed by the experience of the English Parliament's struggle with the Stuart monarchs — asserted robust control over appropriations to check the power of royal governors, often exercising greater control over spending than that of the lower house of Parliament.[12] This allocation of power was translated into the first state constitutions, all of which except Georgia's contained explicit provisions for legislative control over spending.[13] It was against this backdrop of settled legislative supremacy over spending that the founders drafted and ratified the Constitution's provisions ensuring Congress's power of the purse.[14]

Constitutional Text and Structure

The first such provision is the Appropriations Clause, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[15] "Textually, the command is unmistakable — no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[16] An affirmative complement to the Appropriation Clause's prohibition, the Necessary and Proper Clause provides Congress with broad discretion to fashion appropriations — their duration, purpose, conditions on their expenditure — as it sees fit.[17] And as the Supreme Court recently recognized, this grant of discretion empowers Congress to mandate that the executive branch spend an appropriation.[18] The final constitutional provision demarcating Congress's primary role in federal spending (and the president's secondary one) is the Take Care Clause, which imposes on the president the duty to see that "the Laws be faithfully executed."[19] Though the meaning of this clause is deeply contested, at a minimum it means that the president may not refuse to follow federal law

[11] *Cmty. Fin. Servs. Ass'n*, 601 U.S. at 431.
[12] Josh Chafetz, *Congress's Constitution* 53 (2017).
[13] *Id.* at 55. Further confirming that state constitutional conceptions of executive power included no inherent power to impound, 10 of the original 13 states later conferred on their governors a line-item veto power, functionally analogous to impoundment, but only long after their state constitutions were originally ratified. Nat'l Conf. of State Legislatures, *Inside the Legislative Process — General Legislative Procedures: The Veto Power* 6-34 (1998) ("Veto Power Table"), https://tinyurl.com/yc38zfy3 (Table 98-6.10) (listing Georgia in 1861, Pennsylvania in 1873, New York in 1874, New Jersey in 1875, Maryland in 1891, South Carolina in 1895, Delaware in 1897, Virginia in 1902, Massachusetts in 1918, and Connecticut in 1924). For example, Massachusetts amended its constitution in 1918 to provide that "[t]he governor may disapprove or reduce items or parts of items in any bill appropriating money," Mass. Const. Amend. art. LXIII, § 5. Connecticut adopted a highly similar amendment in 1924. *See* Conn. Const. art. IV, § 16. And while it did not specifically confer an item-veto power, in 1977, North Carolina adopted a balanced-budget amendment to its constitution directing the governor to "effect the necessary economies in State expenditures" to ensure they do not exceed fiscal-year revenues, N.C. Const. art. III, § 5(3); N.C. Legislative Library, *Amendments to the North Carolina Constitution of 1971* 3 (Jan. 26, 2022), https://tinyurl.com/4j9mryas (noting 1977 adoption of amendment requiring balanced budget).
[14] Chafetz, *supra*, at 56; *Cmty. Fin. Servs. Ass'n*, 601 U.S. at 431.
[15] U.S. Const. art. I, § 9.
[16] *Cmty. Fin. Servs. Ass'n.*, 601 U.S. at 425 (internal citation omitted).
[17] *McCulloch v. Maryland*, 17 U.S. 316, 419-21 (1819).
[18] *Cmty. Fin. Servs. Ass'n.*, 601 U.S. at 431 ("[E]arly legislative bodies exercised a wide range of discretion. Some appropriations required expenditure of a particular amount, while others allowed the recipient of the appropriated money to spend up to a cap.").
[19] U.S. Const. art. III, § 3.

because of a policy disagreement. He lacks the royal power of "dispensation" or "suspension."[20] Therefore, if Congress passes a law appropriating funds and requiring that those funds be spent for a particular purpose, the president must see that the law is executed. He cannot refuse to carry out statutory directives because he disagrees with Congress's policy choice or views the spending as unwise or inflationary.

Proponents of a presidential impoundment power seize on the last of these constitutional provisions, the Take Care Clause, invert its duty into license, and disregard the Constitution's clear commitment of countervailing powers over spending and legislation to Congress.[21] This argument has been brought before the courts in the past, and it has failed every time.

Federal Case Law

Kendall v. United States ex rel. Stokes

The foundational Supreme Court case rejecting broad presidential authority to decline to spend appropriations is *Kendall v. United States ex rel. Stokes*.[22] In 1835, Amos Kendall was appointed postmaster general under President Andrew Jackson. Concerned about potential cronyism in the Post Office, Kendall ordered the withdrawal of credits and the clawback of monies already paid to William Stokes and his partners, who were contract mail carriers in Baltimore.[23] Stokes petitioned Congress for a private relief act — the method of settling monetary claims against the federal government before Congress established the Court of Claims.[24]

---

[20] *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838) (rejecting, emphatically, the argument that the Take Care Clause "vest[s]in the President a dispensing power").

[21] CRA also claims that no fewer than three other clauses in the Constitution "independently" provide the president with a general impoundment power: The Vesting Clause, which says simply that "The executive Power shall be vested in a President"; the Commander in Chief Clause, which says that "The President shall be Commander in Chief of the Army and Navy"; and the Reception Clause, which says that the president "shall receive Ambassadors." CRA, *The President's Constitutional Power of Impoundment* (Sept. 10, 2024), https://tinyurl.com/4mf7mba5; U.S. Const. art. II, §§ 1, 2, 3. The text of these clauses does not indicate any general presidential power to defy spending laws, and CRA's extrapolations are unconvincing. As to the Vesting Clause, CRA argues that the Constitution's vesting of the executive power in the office of the presidency means that specifically enumerated presidential powers, such as the Commander in Chief power, are "exclusive[ly] and preclusive[ly]" the president's, and Congress may not direct them through spending. As one scholar concludes, this claim is a "muddled mismash" of Supreme Court case law. Jack Goldsmith, *The President's Favorite Decision: The Influence of Trump v. U.S. in Trump 2.0*, Exec. Functions (Feb. 10, 2025), https://tinyurl.com/53fnyca6. But even if it were correct, this interpretation of the Vesting Clause does not support a general power of impoundment, only a power to ignore spending laws if they infringe on an enumerated power. And as to the enumerated Commander in Chief and Reception Clause powers on which CRA relies, neither has been interpreted to give the president control over military *spending* or foreign affairs *spending*. *See* Zachary Price, *Funding Restrictions and Separation of Powers*, 71 Vand. L. Rev. 357, 426-37, 449-62 (2018) https://tinyurl.com/2rkx2usn. These "exclusive and preclusive" powers — assuming they are such — do not include spending prerogatives that might supersede Congress's power of the purse.

[22] 37 U.S. 524 (1838).

[23] *Id*. at 609; Daniel Epstein, *Kendall v. United States and the Inspector General Dilemma*, U. Chi. L. Rev. Online, https://tinyurl.com/y4y4nw4j (last visited Jan. 27, 2025).

[24] *See generally* Floyd Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 626 (1985).

Congress passed a law directing the solicitor of the treasury to adjudicate Stokes's contract claim and directing Kendall to pay Stokes whatever the solicitor determined he was owed. Congress was clear about this latter obligation, providing "that the Postmaster General be, and he is hereby, directed to credit such mail contractors with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them …."[25]

The solicitor determined that Stokes was owed $162,727.05 and issued an order to Kendall directing him to pay the amount in full. But Kendall only paid Stokes $122,101.46. After Congress confirmed, by resolution, that it intended Stokes's relief act to be mandatory and the amount the solicitor determined should be paid in full, Stokes filed a mandamus petition to enforce the award with the Supreme Court.[26]

Before the Court, the attorney general defended Kendall's decision to pay less than the full amount owed under law by arguing that the Take Care Clause empowered the president to choose to what extent to enforce laws and the postmaster, as an executive officer, was exercising this delegated power.[27] The Supreme Court emphatically rejected this argument:

> This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice. To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.[28]

CRA argues that *Kendall* does not apply to impoundments, and anyway that the decision was cabined later by the Court in *Decatur v. Paulding*, 39 U.S. 497 (1840).[29] Neither of these arguments is convincing. First, CRA attempts to distinguish *Kendall* by arguing that the case did not involve a dispute over an appropriations law, but rather an obligation under contract made mandatory through a private relief act. But it is unclear why this matters. A private relief act is a law like any other (as are appropriations), and if the law mandates expenditure, *Kendall* says the president has no constitutional power to defy the law. Second, no court has read *Decatur* as limiting or even being in tension with *Kendall*. In fact, *Decatur* itself states that it is affirming the "doctrines … announced in the case of *Kendall*."[30] Rather, the two cases simply deal with two very different kinds of statutes: In *Kendall*, the statute in question imposed a "ministerial [duty]

[25] Act of July 2, 1836, ch. 284, 6 Stat. 665, 665-66, https://tinyurl.com/mr35jpyr.
[26] Epstein, *supra*.
[27] *Kendall*, 37 U.S. at 612-13.
[28] *Id*. at 613.
[29] CRA History at 10-11, https://tinyurl.com/bdedyam6.
[30] 39 U.S. at 516.

with no discretion," while in *Decatur* the statute, which created a Navy pension program, reposed discretion to adjudicate pension claims in the secretary of the navy.[31]

Kendall is still good law, and federal courts have applied it consistently to reject presidential impoundments premised on an exercise of authority under the Take Care Clause — most prominently in response to President Nixon's failed campaign of impoundments.

Nixon-Era Litigation

In the early 1970s, President Nixon undertook a wide-ranging program of impoundments, withholding billions in congressional appropriations for public housing, highway funding, community health centers, farm relief, and other social programs that he disfavored and viewed as inflationary. He justified his actions by asserting a "constitutional right for the President of the United States to impound funds."[32]

Nixon's impoundments drew a fierce backlash from Congress, culminating in the passage of the Impoundment Control Act.[33] But they were also immediately tested in the courts. States, cities, and organizations who saw their federal funding withheld filed lawsuits seeking the release of the funds. In the district courts, the administration argued that the president had a constitutional power to withhold the funds. It resoundingly lost.[34] Some courts were incredulous at the administration's position.[35] Many viewed the matter as settled by *Kendall*.[36] None accepted the administration's position that the Constitution empowered the president to ignore spending laws. In a decision representative of the district courts' reception of Nixon's argument, Judge Gesell wrote: "At least with respect to the programs involved here, there is no basis for defendants' assertion of inherent constitutional power in the Executive to decline to spend in the face of a clear statutory intent and directive to do so .... The defendants have no residual constitutional authority to refuse to spend the money."[37]

---

[31] *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925) (comparing *Kendall* and *Decatur*). *See also* Zachary S. Price, *The President Has No Constitutional Power of Impoundment*, Yale J. Reg. Online (July 18, 2024), https://tinyurl.com/247j95un (critiquing CRA's attempt to distinguish *Kendall*).
[32] The President's News Conference of January 31, 1973, 1 Pub. Papers 62 (1973), https://tinyurl.com/447re5j5.
[33] Congressional Budget & Impoundment Control Act of 1974, Pub. L. No. 93-344, tit. X, 88 Stat. 297, 332-39 (1974), https://tinyurl.com/5xn329ve (now codified at 2 U.S.C. §§ 682-88).
[34] *See, e.g.*, *Guadamuz v. Ash*, 368 F. Supp. 1233, 1243-44 (D.D.C. 1973); *Loc. 2677, Am. Fed'n of Gov't Emp. v. Phillips*, 358 F. Supp. 60, 77 (D.D.C. 1973); *Louisiana. v. Weinberger*, 369 F. Supp. 856, 864 (E.D. La. 1973); *Nat'l Council of Cmty. Mental Health Ctrs., Inc. v. Weinberger*, 361 F. Supp. 897, 901; 903 (D.D.C. 1973); *Cmty. Action Programs Exec. Directors Ass'n of N.J., Inc. v. Ash*, 365 F. Supp. 1355, 1360 (D.N.J. 1973); *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689, 696 (E.D. Va. 1973); *Pennsylvania v. Lynn*, 362 F. Supp. 1363, 1372 (D.D.C. 1973); *Guste v. Brinegar*, 388 F. Supp. 1319, 1324–25 (D.D.C. 1975). The Nixon administration did win some cases on statutory grounds, but to our knowledge no court recognized the constitutional power claimed. *See Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974); *Hous. Auth. of City & Cnty. of San Francisco v. HUD*, 340 F. Supp. 654, 657 (N.D. Cal. 1972).
[35] *Loc. 2677*, 358 F. Supp. at 77 ("The defendant really argues that the Constitution confers the discretionary power upon the President to refuse to execute laws passed by Congress with which he disagrees ....").
[36] *E.g. Campaign Clean Water*, 361 F. Supp. at 696 ("More than a century ago the United States Supreme Court laid to rest any contention that the President has the power suggested.").
[37] *Nat'l Council of Cmty. Mental Health Ctrs.*, 361 F. Supp. at 901, 903.

By the time the issue made it to the appellate courts, the administration had abandoned its constitutional argument.[38] In the sole impoundment case to make it all the way to the Supreme Court, the Nixon administration expressly disclaimed any constitutional issue. In fact, the solicitor general argued that the administration's decision to withhold funds was in accord with *Kendall*'s holding that the Constitution only countenances executive withholdings of appropriations where Congress provides such discretion.[39]

Contemporary Ratification of *Kendall* and Nixon-Era Cases

The federal litigation generated by Nixon's impoundments thus reinforced, unanimously, the Supreme Court's conclusion in *Kendall* that the president lacks any inherent constitutional power of impoundment. No claims to such power have been asserted in court since. However, in recent decades a number of prominent jurists (including proponents of a unitary executive and two current Supreme Court justices), have agreed in dicta that there is no presidential impoundment power, and executive branch lawyers have issued legal opinions consistently finding the same.

In *Clinton v. City of New York*, a case striking down the Line Item Veto Act — that is, Congress's attempt to *give* the president a unilateral impoundment power — Justice Scalia wrote in concurrence that "President Nixon, the Mahatma Gandhi of all impounders, asserted at a press conference in 1973 that his 'constitutional right' to impound appropriated funds was 'absolutely clear.' Our decision two years later in *Train v. City of New York*, proved him wrong."[40]

And in *In re Aiken County*, then-circuit judge Brett Kavanaugh wrote that "a President sometimes has policy reasons … for wanting to spend less than the full amount appropriated by Congress for a particular project or program. But in those circumstances, even the President does not have unilateral authority to refuse to spend the funds."[41] Even these jurists who hold (or held) expansive views of executive power could not accept the proposition that the president could defy spending laws.

Judge Kavanaugh's opinion cited a memorandum written by William Rehnquist when he was an assistant attorney general in the Office of Legal Counsel (OLC). OLC's primary function is to prepare and provide legal advice to the president and executive branch agencies,[42] and its lawyers thus tend to be institutionally inclined toward an expansive view of executive power.

---

[38] *See, e.g.*, *City of New York v. Train*, 494 F.2d 1033, 1050 n.39 (D.C. Cir. 1974) ("There is no constitutional question in this case. Both sides have agreed[.]"). The Nixon administration appears to have made an early bid for the Supreme Court to intervene in the constitutional litigation, supporting a motion filed by the state of Georgia for leave to file a bill of complaint directly in the Supreme Court in an impoundment case while district court litigation was pending. Louis Fisher, *Court Cases on Impoundment of Funds: A Public Policy Analysis* 76-80 (1974). The Supreme Court declined to hear the case. *Georgia v. Nixon*, 414 U.S. 810 (1973).
[39] *See* Br. for Pet'r at 37-38, *Train v. City of New York*, 420 U.S. 35 (1975).
[40] 524 U.S. 417, 468 (1998) (Scalia, J. concurring in part and dissenting in part) (internal citations omitted).
[41] 725 F.3d 255, 261 n.1 (D.C. Cir. 2013).
[42] 28 C.F.R. § 0.25(a).

In his opinion, Rehnquist considered the question of the president's power to impound directly. His conclusion was unambiguous: "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent."[43]

> "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent."
>
> **CHIEF JUSTICE WILLIAM REHNQUIST**

Rehnquist's OLC opinion is in accord with every other OLC opinion to consider the matter.[44] It also is in accord with the beliefs Chief Justice John Roberts held while serving as associate White House counsel in the Reagan administration. In a 1985 memorandum, Roberts wrote that "the question of whether the President has such [impoundment] authority is not free from doubt, but I think it clear that he has none in normal situations."[45] Roberts went on to explain his view that the office of the presidency and its institutional interests are best served not by recklessly pushing the boundaries of its authority, but by principled adherence to the separation of powers: "Our institutional vigilance with respect to the constitutional prerogatives of the

[43] *Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools*, 1 Supp. Op. O.L.C. 303 (Dec. 1, 1969), https://tinyurl.com/zxff6mj7.
[44] *See Memorandum to the Honorable Edward L. Morgan, Deputy Counsel to the President* (Dec. 19, 1969) (determining whether the president has authority to impound certain funds by analyzing whether Congress provided this discretionary authority in statute), https://tinyurl.com/5m7n25xb; *Memorandum to Clark MacGregor, Counsel to the President, from Ralph E. Erickson, Acting Assistant Attorney General, Re Constitutional Power of Congress to Compel Spending of Impounded Funds* (Jan. 7, 1972) (secured via FOIA), https://tinyurl.com/yc7rxphc ("In response to your question whether Congress can constitutionally require ... the President to spend funds appropriated by the Congress for domestic programs but thereafter impounded by the President, we would find it difficult to recommend to the Attorney General that he should take the position that the Congress does not have that power. The Office of Legal Counsel has consistently held that Congress has this authority.").*The President's Veto Power*, 12 Op. O.L.C. 128, 166-68 (July 8, 1988), https://tinyurl.com/mt596rfu ("Moreover, to the extent that the commentators are suggesting that the President has inherent, constitutional power to impound funds, the weight of authority is against such a broad power in the face of an express congressional directive to spend. This Office has long held that the 'existence of such a broad power is supported by neither reason nor precedent .... There is no textual source in the Constitution for any inherent authority to impound.'").
[45] *Memorandum from John G. Roberts, Assoc. White House Couns., for Fred F. Fielding, Couns. to the President, Regarding Impoundment Authority* (Aug. 15, 1985), https://tinyurl.com/ms8ak8h5.

presidency requires appropriate deference to the constitutional prerogatives of the other branches, and no area seems more clearly the province of Congress than the power of the purse."[46] Thus, even executive branch lawyers have consistently rejected the notion that the Constitution contains an implied power of impoundment.

[46] *Id.*

III. Executing Congressional Appropriations: Correcting Mischaracterizations of the History of Presidential Impoundments

It is clear from the text and structure of the Constitution, and from consistent Supreme Court precedent, that Congress — not the president — has the power to decide how federal funds are spent.

Perhaps for this reason, the Center for Renewing America has tried to craft an argument based on historical practice.[47] CRA claims that it has been "overwhelmingly understood" throughout American history — from the founding until the Nixon presidency — that the president cannot be compelled by Congress to spend federal funds.[48] It claims that, prior to the passage of the Impoundment Control Act in 1974, "impoundment occurred routinely and frequently without protests from Congress,"[49] and that presidential impoundments were "acknowledged as executive in nature and applauded by legislators."[50] In support of these claims, CRA cites approximately 41 examples[51] that it argues are instances in which a president impounded funds in reliance on this shared understanding of the Constitution.

Simply put, CRA's characterization of this history is inaccurate.

Below we examine all 41 historical examples CRA cites (which we have divided into a total of 60 alleged impoundments). Drawing on the detailed appendix to this paper, we demonstrate that these examples fail to support claims of a historical practice of unilateral presidential impoundment. Most of the examples CRA cites are not germane to their argument, either because they are not impoundments at all or because the executive action at issue was

[47] Of the two full-length reports that CRA has published on this topic, one focuses entirely on this historical argument and the other blends assertions about history with other arguments, but begins the very first sentence with a claim about history. CRA History, *supra*; Mark. Paoletta & Daniel Shapiro, *The President's Constitutional Power of Impoundment*, at 1, Ctr. for Renewing Am. (2024), https://tinyurl.com/2t7257ce (beginning "since the Founding, it has been understood …").
[48] CRA History at 1, https://tinyurl.com/mr2cnwej.
[49] CRA Staff, *Impoundment Claim & Response*, at 2, Ctr. for Renewing Am. (2024), https://tinyurl.com/59zu7btz.
[50] Paoletta & Shapiro, *The President's Constitutional Power of Impoundment*, *supra*, at 7, https://tinyurl.com/2a85ww7z.
[51] Some examples CRA offers are broad and overlapping, so the precise number may vary depending on the judgments one makes about which examples are distinct.

authorized by Congress. Of the relatively few instances — 12 total — in which presidents impounded funds against the instructions of Congress, six took place within one three-year period (during the presidency of Franklin Roosevelt), and almost all of the 12 were either: (1) putatively justified, at least in part, based on statute; (2) vigorously opposed by Congress; or (3) in one prominent instance, overturned by the courts.

Evaluating Practice-Based Constitutional Arguments

Given the centrality and clarity of Congress's power of the purse in both the text and original understanding of the Constitution, there should be no need to consider historical practice in order to conclude that the president lacks any inherent power to impound appropriated funds.[52]

However, when courts do consider evidence of historical practice — as they often do in separation of powers cases[53] — they set a high bar for accepting such evidence as a "gloss" on the text of the Constitution. The canonical description of the use of such evidence is Justice Frankfurter's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*:

> [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.[54]

It is no wonder, then, that proponents of a presidential power to impound resort to making sweeping historical claims. In order for their argument to prevail, they need to show that presidents have "systematic[ally]" impounded funds without congressional permission, that this practice has been long and continuous ("unbroken"), and that it was known to Congress and "never before questioned." Moreover, it is critical, particularly to any interpreter concerned with the original meaning of the Constitution, that the practice extends back to the founding era.[55]

As we detail below, CRA fails to show any systematic, continuous, unquestioned practice, let alone one dating back to the founding era.

---

[52] Notably "[i]nterpreters [of the Constitution] who are strong textualists, structuralists, or originalists will rarely, if ever, reason from historical practice (at least explicitly)." Alison L. LaCroix, *Historical Gloss: A Primer*, 126 Harv. L. Rev. F. 75, 81 (2012), https://tinyurl.com/4v4acxhn.
[53] Trevor W. Morrison & Curtis A. Bradley, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 412-13 (2012), https://tinyurl.com/4xtjc2e3 ("Arguments based on historical practice are a mainstay of debates about the constitutional separation of powers."); *see, e.g.*, *Zivotofsky v. Kerry*, 576 U.S. 1 (2015); *NLRB v. Canning*, 573 U.S. 513 (2014); *The Pocket Veto Case*, 279 U. S. 655 (1929).
[54] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).
[55] *See, e.g.*, *Cmty. Fin. Servs. Ass'n*, 601 U.S. at 426 (basing its analysis of Congress's power under the Appropriations Clause on "the Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification").

Understanding Different Categories of Impoundments

Before turning to the broad historical argument, it is important to understand the "practice" that CRA is trying to constitutionalize, and to what extent individual examples in fact fit that alleged practice.

Perhaps the most serious error in CRA's reasoning is its failure to recognize critical distinctions between different kinds of presidential impoundments. As the Government Accountability Office (GAO) explains, an impoundment is any "action or inaction by an [executive] officer or employee" that "delays or precludes the obligation or expenditure of budget authority."[56] Or put more simply: an impoundment is the temporary deferral or permanent withholding of "funds that Congress has provided in legislation."[57] But not all impoundments are alike.

Congress sometimes requires the president to spend appropriated funds, and sometimes gives the president a degree of discretion to delay, withhold, or reallocate funds. In a recent Supreme Court decision, Justice Clarence Thomas notes that this distinction predates the Constitution, in "[t]he appropriations practice in the Colonies and early state legislatures":

> Some appropriations required expenditure of a particular amount, while others allowed the recipient of the appropriated money to spend up to a cap. Some appropriations were time limited, others were not. And, the specificity with which appropriations designated the objects of the expenditures varied greatly.[58]

The key point here is that, if Congress *authorizes* the president to delay expenditures or withhold funds, and the president does so, that is technically an "impoundment," but not evidence of any inherent presidential power. Rather, when this happens, Congress is exercising the power of the purse and the president is simply operating within the bounds that Congress has set.

In the three-part framework famously articulated by Justice Jackson in *Youngstown*, the president's power "is at its maximum" "[w]hen the President acts pursuant to an express or implied authorization of Congress."[59] The president's power exists in a middle zone when the distribution of power between Congress and the president overlaps or is uncertain.[60] And the president's power "is at its lowest ebb" "[w]hen the President takes measures incompatible with the expressed or implied will of Congress."[61]

---

[56] GAO, GAO-16-464SP, *Principles of Federal Appropriations Law, Chapter 2: The Legal Framework* 2-47 (2016), https://tinyurl.com/4fumbp3y.
[57] Richard Kogan, *FAQs on Impoundment: Presidential Actions Are Constrained by Long-Standing Constitutional Restrictions* 2, Ctr. for Budget & Pol'y Priorities (2024), https://tinyurl.com/y6ydcw87.
[58] *Cmty. Fin. Servs. Ass'n,* 601 U.S. at 431-32.
[59] 343 U.S. at 635 (Jackson, J., concurring).
[60] *Id.* at 637.
[61] *Id.*

CRA argues that the president can impound funds *in spite of the express will of Congress*, the third of the *Youngstown* categories. However, the large majority of the examples CRA cites fall into the first *Youngstown* category: Congress, via statute, authorized the president to impound funds. These examples therefore actually undercut CRA's argument.

Consider what CRA calls "the most famous early impoundment precedent": Thomas Jefferson's decision not to purchase gun boats to patrol the Mississippi River.[62] Congress passed a statute that "authorized and empowered" Jefferson to construct "a number not exceeding fifteen gun boats" using "a sum not exceeding fifty thousand dollars."[63] Those words make clear that Congress gave President Jefferson *permission* to spend federal funds to construct the gun boats without *requiring* him to purchase the gun boats. Indeed, that is precisely how Justice Scalia interpreted the gun boat appropriation when he described it in a 1998 concurring opinion, referring to it as a "permissive" appropriation that left "the decision to spend the money to the President's unfettered discretion."[64] Nonetheless, CRA cites this as evidence that Jefferson believed he had a constitutional right to ignore congressional appropriations that require expenditure.

Of course, Congress frequently appropriates funds of specific amounts for specific purposes and has done so throughout American history. For example, the same Congress that told Jefferson he could spend "a sum not exceeding fifty thousand dollars" on gun boats also appropriated exactly "sixteen thousand nine hundred and forty-eight dollars and thirty-seven cents" to repay an estate for "naval materials" it purchased,[65] and specified the exact salary and benefits to be paid to two music teachers for the army's artillery regiment.[66] But CRA makes no effort to determine whether any of the impoundments it cites are in accordance with, or contrary to, statutory instructions.

CRA also elides other important distinctions. For example, it sometimes cites historical events that are not properly understood as impoundments. One such event is a decision made by President Van Buren's secretary of the navy about whether the widow of a Navy veteran was entitled to a second pension. The secretary determined she was not, and the Supreme Court upheld that as an appropriate exercise of discretion.[67] CRA makes much of this decision, claiming that it validates "the Executive's long-recognized impoundment authority."[68] But this

---

[62] CRA History at 9, https://tinyurl.com/cjauyje.
[63] *See* Act of Feb. 28, 1803, ch. XI, § 3, 2 Stat. 206, https://tinyurl.com/5byhrt3c.
[64] *See Clinton*, 524 U.S. at 466-67 (Scalia, J., concurring in part and dissenting in part) ("From a very early date Congress also made permissive individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion. In 1803, it appropriated $50,000 for the President to build 'not exceeding fifteen gun boats, to be armed, manned and fitted out, and employed for such purposes as in his opinion the public service may require'[.]") (quoting statute).
[65] Act of Mar. 2, 1803, ch. XVII, § 1, 2 Stat. 209, https://tinyurl.com/zamds6r9.
[66] The same is true of the salary and benefits provided to infantry music teachers, which were fixed the previous year at $8 per month, one ration daily, and, annually, "one hat, one coat, one vest, two pair of woollen and two pair of linen overalls, one coarse linen frock and trowsers for fatigue clothing, four pair of shoes, four shirts, two pair of socks, two pair of short stockings, one blanket, one stock and clasp, and one pair of half gaithers." *See* Act of Feb. 28, 1803, ch. XIII § 1, 2 Stat. 206, https://tinyurl.com/5byhrt3c; Act of Mar. 16, 1802, ch. IX, §§ 4-7, 2 Stat. 134, https://tinyurl.com/yc78ytz5.
[67] *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 513 (1840).
[68] CRA History at 11, https://tinyurl.com/ypyt2dbp.

was not an impoundment at all; it was an individualized determination of eligibility for a government benefit. The government makes a multitude of such determinations. Decisions to deny an individual a National Science Foundation grant or determine them ineligible for Social Security disability benefits may be challenged as contrary to law, but they are not impoundments — and neither was Secretary Dickerson's pension decision.

> "Much as we love the President, if Congress ... passed a law that garbage should be put on the White House steps, it would be our regrettable duty, as a bureau, in an impartial, nonpolitical and nonpartisan way to advise ... as to how the largest amount of garbage could be spread in the most expeditious and economical manner."
>
> **CHARLES DAWES**

Lastly, CRA in several cases notes that executive branch officials sometimes make an effort to find cost savings, and, again, points to this as evidence that the president has the unrestricted authority to refuse to spend money appropriated by Congress. However, even prior to the passage of the Impoundment Control Act (which provides a mechanism for the president to seek Congress's permission to reduce spending), the executive branch still had to follow governing law — to include the relevant appropriations and enabling statutes, and the Antideficiency Act[69] — when attempting to find such savings and ensure that doing so was fully consistent with "the accomplishment of the objects of legislation."[70]

---

[69] Pub. L. No. 58-217, ch. 1484, § 4, 33 Stat. 1214, 1257-58 (1905), https://tinyurl.com/yc3fmej7; Pub. L. No. 59-28, ch. 510, § 3, 34 Stat. 27, 48-49 (1906), https://tinyurl.com/yc7p93w; Pub. L. No. 81-759, ch. 896, § 1211, 64 Stat. 595, 765-66 (1950), https://tinyurl.com/mvx8×3xa.

[70] Charles Dawes, *The First Year of the Budget of the United States* 118 (1923), https://tinyurl.com/436k8ykh. Some scholars refer to "uncontroversial" cost savings — where the executive branch can faithfully execute a statutory function or make purchases for less money than Congress appropriated — as "routine impoundments," distinct from "policy impoundments" which defy Congress's will. Chafetz, *supra*, at 64; Louis Fisher, *Congressional Budget Reform: The First Two Years*, 14 Harv. J. on Legis. 413, 448-49 (1977), https://tinyurl.com/3p3kv32b. In this view, if Congress appropriates $10 for a fixed expense and the executive branch finds that it can make that exact same purchase for $8 — without "interfer[ing] with the priorities for spending which are established by Congress" — it makes sense that Congress would not object. *See* Fisher, *Congressional Budget Reform*, *supra*, at 448; *but see* Allen Schick, *Whose Budget? It All Depends on Whether the President or Congress Is Doing the Counting*, in *The Presidency and the Congress: A Shifting Balance of Power* 103 (William S. Livingston et al. eds., 1979) ("Far from administrative routine, Nixon's wholesale impoundments in

CRA highlights a process created by Charles Dawes, the first director of the Bureau of the Budget under President Harding, which required government officials to try to identify possible savings.[71] But Dawes could not have been clearer in his view that Congress had the power of the purse, and that any savings identified had to be consistent with congressional objectives. "Much as we love the President," Dawes explained, "if Congress, in its omnipotence over appropriations and in accordance with its authority over policy, passed a law that garbage should be put on the White House steps, it would be our regrettable duty, as a bureau, in an impartial, nonpolitical and nonpartisan way to advise the Executive and Congress as to how the largest amount of garbage could be spread in the most expeditious and economical manner."[72]

CRA hopes to demonstrate that, regardless of what Congress wants, the president is empowered under the Constitution to withhold congressionally-appropriated funds for his own purposes. Ironically, because CRA fails to distinguish between different types of impoundments — and indeed, some non-impoundments — most of the examples it cites show exactly the opposite: that presidents have largely operated within the bounds Congress has set and gone to some length to ensure that congressional objectives are efficiently achieved.

Correcting the Historical Record

Considering these distinctions, the historical evidence CRA attempts to muster falls far short of establishing a consistent practice of unilateral presidential impoundments.

The attached appendix examines all 41 examples of supposed impoundments that CRA cites in support of its claims. Some of the historical examples are in fact quite complex. For example, CRA's reference to President Lyndon Johnson's impoundment of funds appropriated for the Department of Health, Education and Welfare seems to refer generally to reductions that Johnson made to over 40 different budget items, including several reductions to elementary and secondary education, which CRA lists separately.[73] In our analysis, we separate out the specific reductions, and analyze all those that account for $10 million or more in potentially impounded funds.[74] We also separate out several different reductions that President Franklin Roosevelt made to public works projects that CRA treats as a unified example. After these disaggregations, the appendix contains 60 total examples.

late 1972 and 1973 were intended to rewrite national priorities at the expense of congressional power and preferences.").

[71] CRA History at 13, https://tinyurl.com/bdf9×8u4. For further analysis of the process Dawes established, see A11-A13.

[72] Dawes, *supra*, at 178, https://tinyurl.com/ykdnjth5.

[73] CRA History at 18, https://tinyurl.com/35zkwp4z.

[74] Because of the time required to identify and analyze the appropriations and other relevant statutes implicated in Johnson's scores of spending reductions, we chose potential impoundments at or above $10 million in value, as they capture the overwhelming majority of the funds Johnson allegedly impounded for the Departments of Agriculture (more than 90%); Housing and Urban Development (over 99%); and Health, Education, and Welfare (more than 70%). A42-A69. Considering cuts at or above that level thus gave us a representative — and more digestible — sample.

For each of these examples, we analyzed:

(1) Whether the conduct in question was, in fact, an impoundment;
(2) Whether the impoundment was authorized by statute; and
(3) If the impoundment did not appear to be authorized by statute, what justification, if any, the president offered for impounding the funds.

In some cases, we could not answer all these questions conclusively. The work of discerning the legal basis and justification for each instance in which federal funding was withheld (if, in fact, it was withheld) requires extensive research spanning most of American history. In assembling the appendix, we reviewed all sources cited by CRA, and in turn, any relevant sources cited by those sources. We also conducted extensive research on federal authorizations, appropriations, and other relevant statutes. However, it was not always possible to locate all relevant information, and so there may be isolated instances in which our research did not uncover all of the relevant facts.

The overall picture presented by the appendix, however, is clear. First, only in a small minority of instances did presidents actually impound funds without congressional authorization. Second, there are even fewer examples of unauthorized impoundments in early American history. Third, prior to the Nixon administration, when presidents did impound funds without statutory authorization, they often attempted to justify those impoundments as permitted by statute. And, finally, after Nixon's abuse of impoundments and the passage of the Impoundment Control Act, every subsequent president (until now) has accepted the legitimacy of the Impoundment Control Act and of Congress's control over appropriations. From 1974 to 2023, no president of either party asserted an inherent power to impound — until Trump did so in a June 2023 campaign video.

CRA Provides Few Examples of Presidents Impounding Funds in Defiance of Congress at Any Point in History

Substance aside, the examples CRA cites implicate only a tiny share of the innumerable appropriations that Congress has enacted over the course of American history. CRA cites 41 alleged instances of presidential impoundment. Individual modern appropriations bills contain far more spending instructions — for example, the 2024 Department of Defense Appropriations Act alone is 58 pages long and in some places includes many individual line items on each page.[75] Even taking CRA's examples at face value, they would represent only a drop in the bucket of funds Congress has appropriated from the founding through 1974.

But it would be a mistake to take CRA's evidence at face value. Of the 60 examples we review in the appendix, five were not impoundments[76] and 39 seem to have been authorized by statute. In

[75] Pub. L. No. 118-47, div. A, 138 Stat. 462, 462-520 (2024), https://tinyurl.com/bdd8s4hy.
[76] Rather than impoundments, these five actions instead were: an adjudication of eligibility for a pension under President Van Buren, A8; a prompt expenditure of funds to pay for construction of the *U.S.S. United States* under

four instances, which we marked as "unknown," it was not possible to determine from the sources CRA cited and additional research whether the alleged impoundment was authorized by statute, not authorized, or not an impoundment. That leaves only 12 examples in which presidents withheld money that Congress required them to spend. As discussed further below, even in those few instances of presidential defiance of statute, the justifications presidents offered for the impoundments lend little support to the idea of an inherent presidential impoundment power, and no support to the idea that Congress acquiesced to any such claim of power.

CRA Fails to Identify Any Founding-Era Assertions of a Unilateral Executive Impoundment Power

As thin as CRA's evidence is overall, their historical account is perhaps most lacking with regard to the founding era. The last founding father to serve as president was James Monroe, America's fifth president. For the period of the first five presidencies, spanning 36 years, CRA offers only five examples of alleged presidential impoundments. In none of these examples did the president express any intent to impound money against the wishes of Congress, let alone assert a constitutional right to do so.

CRA's first example comes during the Washington administration, which it alleges "underspent tens of thousands on hospital department appropriations."[77] This assertion finds its roots in a February 1797 congressional debate recounted in Joseph Gales's *Annals of Congress*.[78] Although CRA does not specify which Washington-era hospital department appropriations were "underspent,"[79] Gales makes specific reference to a 1796 appropriation, which the military reportedly did not spend in full on its hospital department.[80] According to Gales, Congress had previously appropriated $30,000 for the military's hospital department, but that year's expenses for the department "had [only] cost six thousand nine hundred and five dollars."[81] The military both withheld the remainder of the appropriation, which it did not spend on its hospital department, and then "appl[ied] the surplus to other purposes"[82] — a clear violation of the relevant appropriations statute, which provided no authority for that action.[83]

President Truman, A29-A30; a prompt expenditure of funds by President Johnson's Agriculture Department for small watershed projects, A42-A43; an adjustment of expected earnings from an accelerated sale of agriculture loans under Johnson, A52-53; and a Johnson administration effort to fight inflation by inducing lenders to make fewer student loans, A61-A62.

[77] CRA History at 5, https://tinyurl.com/5d8vsuy6.

[78] Joseph Gales, *Annals of the Congress of the United States: Fourth Congress, Second Session* 2321 (1849) (statement of Rep. Albert Gallatin), https://tinyurl.com/ycaptp79; CRA History at 5 (citing Lucius Wilmerding, *The Spending Power* 41 (1943)); Wilmerding, *supra*, at 41 & n.34 (citing Gallatin's statement at "6 *Annals*, 2321").

[79] CRA History at 5, https://tinyurl.com/5d8vsuy6.

[80] Gales, *supra*, at 2321, https://tinyurl.com/ycaptp79; Act of June 1, 1796, ch. 51, § 1, 1 Stat. 493, 494, https://tinyurl.com/y8m4yfvs ("For the hospital department, the sum of thirty thousand dollars ....").

[81] Gales, *supra*, at 2321, https://tinyurl.com/ycaptp79.

[82] *Id.*

[83] Even CRA does not argue that Washington's illegal transfer of funds from the hospital department appropriation to "other purposes" was lawful.

Prominent members of Congress were appalled by this unconstitutional spending and sought to prevent more of it going forward. Rep. Albert Gallatin — who would later serve as secretary of the treasury for 14 years under Presidents Jefferson and Madison — reported with concern that the treasury secretary was treating military appropriations "as general grants of money," a practice which was "making the law a mere farce."[84] Gallatin advocated for and secured a drastic reduction in the hospital appropriation for the following fiscal year,[85] and sought also to put some "contingent articles together in one sum."[86] "It was thought," one scholar wrote, "that, by allowing a certain latitude to the War Department in the matter of contingent expenses, Congress would be justified in expecting the expenditure of money to be confined to the specific objects for which each sum was appropriated."[87] In other words, Congress both decried the Washington administration's actions and passed legislation to prevent such conduct going forward.

CRA next points to instances where Presidents Jefferson and Madison allegedly impounded funds. Jefferson, CRA contends, impounded funds Congress appropriated for the construction of navy yards and gunboats, as well as for a government "'contingency fund.'"[88] And Madison impounded funds appropriated for "the crews of gunboats in New Orleans."[89] But three of these four examples — including Jefferson's decision not to purchase gun boats, already discussed above — were expressly authorized by Congress.[90] Jefferson's decision to spend less than the full amount Congress set aside for the government's "contingent expenses" was clearly permitted by the text and nature of the underlying appropriations statutes.[91] By definition, funds for "defraying the contingent expenses of government"[92] are intended to be used only if contingencies arise. Similarly, President Madison's decision to save money by reducing the size of the crews of gun boats in New Orleans was one Congress had clearly provided for when it appropriated "a sum not exceeding four hundreds thousand dollars" to employ those crews, and explicitly stated that Madison may discharge those crews "if in his judgment their service may be dispensed with."[93]

That leaves one final founding-era example — President Jefferson's decision to suspend the construction of navy yards. Jefferson's action was not authorized by the plain text of the applicable 1801 appropriation, which provided $500,000 for "the expenses attending six seventy-four gun ships, and for completing navy yards, docks, and wharves."[94] However, Jefferson made clear in his first annual message to Congress that he had "suspended or slackened" the expenditure of funds for constructing navy yards not because of any policy

[84] Gales, *supra*, at 2321, https://tinyurl.com/ycaptp79 (statement of Rep. Albert Gallatin as summarized by Gales).
[85] The 1797 hospital department appropriation provided for "a sum not exceeding ten thousand dollars." Act of Mar. 3, 1797, ch., 17, § 1, 1 Stat. 508, 508, https://tinyurl.com/ynpvrueh.
[86] *Id*.
[87] Wilmerding, *supra*, at 41.
[88] CRA History at 8-9, https://tinyurl.com/bde6dp2a.
[89] *Id.* at 9.
[90] A5-A6.
[91] *See* Act of May 1, 1802, ch. 47, 2 Stat. 184, 188, https://tinyurl.com/mrej99y7; Act of Mar. 1, 1805, ch. 21, 2 Stat. 316, 321, https://tinyurl.com/3a8p85ky; Act of Feb. 10, 1808, ch. 17, 2 Stat. 462, 466, https://tinyurl.com/yz36j79d.
[92] *Id.*
[93] Act of July 2, 1836, ch. 284, 6 Stat. 665, 665-66, https://tinyurl.com/mr35jpyr.
[94] Act of Mar. 3, 1801, § 1, 2 Stat. 122-23, https://tinyurl.com/bdfpfdz2.

disagreement with Congress, but because he doubted whether the prior administration had "perfectly understood" the "authority given by the Legislature" for that construction.[95] In other words, Jefferson withheld the funds because the Adams administration had taken steps to purchase and construct six navy yards,[96] when they were granted the authority in statute to build only two.[97] It was not clear whether Congress, through its 1801 appropriation, had intended for Jefferson to finalize the construction of only two navy yards, or all the navy yards that the previous administration had acquired, including those purchased without clear statutory authorization. Therefore, Jefferson impounded the navy yard funds not as an exercise of any asserted presidential prerogative, or in defiance of Congress, but in an effort to accurately discern Congress's will. Or as Jefferson put it in his first annual message, he slackened expenditures so "that the Legislature might determine whether so many yards are necessary as have been contemplated."[98]

In summary, CRA cites no examples in which a founding-era president impounded funds in defiance of Congress on the basis of an asserted executive power. Nor does it identify any instance in which one of America's first five presidents even *claimed* to have such a power. Rather, the evidence CRA cites shows presidents impounding funds pursuant to authority Congress gave them in statute (Jefferson's gunboat and contingency fund impoundments, and Madison's gunboat impoundment) or in order to clarify what authority Congress gave them (Jefferson's navy yard impoundment). And when the Washington administration not only impounded funds but illegally used them for "other purposes,"[99] Congress, led by Jefferson and Madison's future treasury secretary, responded legislatively.

Jackson and FDR Were the Only Presidents Prior to Nixon Both to Impound Funds in Defiance of Congress and to Assert a Constitutional Justification

As noted above, of the 60 examples included in the appendix, there are only 12 in which it appears that the president withheld funds without congressional authorization to do so. Most of these unauthorized impoundments (six) took place during President Franklin Roosevelt's administration. Prior to FDR, no president other than Andrew Jackson asserted a constitutional power to impound funds in defiance of Congress — and the Supreme Court roundly rejected Jackson's assertion of power.[100]

---

[95] Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801), https://tinyurl.com/52m6ajsz.
[96] H.R. Doc. No. 7-28 (1802), *in* Walter Lowrie & Walter Franklin, eds., *American State Papers* 103 (1834), https://tinyurl.com/3hssw3jm; H.R. Doc. No. 7-186, at 2 (1802) (hereinafter Nicholson Report), *in* Walter Lowrie & Matthew St. Clair Clarke, eds., *American State Papers* 753 (1832), https://tinyurl.com/29tcz44x.
[97] Acts of Feb. 25, 1799, chs. XV & XVI, 1 Stat. 622 (1799), https://tinyurl.com/3f88f2ek (appropriating $50,000 for the construction of two docks); *see* Nicholson Report, *supra*, at 2, https://tinyurl.com/29tcz44x (congressional committee report subsequently finding that "no authority was given, by law, nor any appropriation made, except for the two docks" and "that four of the navy yards were purchased without authority, and the money misapplied which was paid for them"). See A4-A5.
[98] Jefferson, First Annual Message to Congress, *supra*, https://tinyurl.com/52m6ajsz.
[99] *See* Gales, *supra*, at 2321, https://tinyurl.com/ycaptp79.
[100] We address the twelfth and final unauthorized impoundment in the appendix. In that instance, during the Eisenhower administration, the Marine Corps impounded funds Congress appropriated to expand the size of the Corps. A32-A33. While this impoundment was not authorized by statute, there is no evidence the Eisenhower administration justified it on constitutional grounds. Moreover, of the eight Eisenhower-era impoundments

Unauthorized Impoundments Before FDR

CRA has identified only five instances during the first 150 years of American history in which presidents refused to spend appropriations in defiance of Congress. These are: the Washington-era impoundment of hospital department funds; Jefferson's impoundment of funds to construct navy yards; a Jackson-era impoundment of funds owed to contract mail carriers; President Buchanan's alleged impoundment of funds for public buildings in Illinois; and President Grant's impoundment of certain river and harbor funds.[101] But these examples do not support the notion that the president has an inherent constitutional power to impound appropriated funds.

- Although the military under **President Washington** both impounded funds appropriated for its hospital department and repurposed them without congressional permission, Washington never asserted that he had any constitutional authority to withhold appropriated funds. And Congress responded to the incident legislatively, including by significantly reducing the military's hospital department appropriation for the following fiscal year.

- Although **President Jefferson** withheld congressional appropriations for navy yards, as explained above, he never asserted any constitutional power to impound appropriated funds. Rather, his actions to "suspend[] and slacken[]" expenditures on the navy yards[102] are best understood as a legitimate attempt to clarify and comply with the intent of Congress.[103]

- The same cannot be said of the refusal of **President Jackson's** postmaster general to pay four contract mail carriers the full amount they were owed, as Congress directed in statute. In the litigation that followed this refusal, the attorney general argued that the Take Care Clause gave the president, and by extension executive officials such as the postmaster general, the discretion to pay less than the full amount that the statute required.[104] In *Kendall*, the Supreme Court rejected that argument, ruled that the postmaster general's nonexpenditure of funds was an unlawful usurpation of Congress's legislative authority, and ordered the administration to pay the contractors the remainder of what they were owed.[105] The administration did so.[106] CRA dismisses this case, arguing that it "did not involve an impoundment, and its principles are not applicable to impoundment."[107] But we nonetheless include this incident here and in the

reviewed in the appendix, it is the only one not authorized by statute. Of the remaining seven, six were authorized by statute and one we categorized as "unknown," as there was not enough information, either provided by CRA or uncovered in our additional research, to draw a well-founded conclusion about the episode. A33-A40.
[101] CRA History at 5, 8, 10-12, https://tinyurl.com/5d8vsuy6.
[102] Jefferson, First Annual Message to Congress, *supra*, https://tinyurl.com/52m6ajsz.
[103] A4-A5.
[104] *Kendall*, 37 U.S. at 612-13.
[105] *Id.* at 609, 612-13, 626. See also *supra* at pg. 6-8.
[106] *Kendall v. Stokes*, 44 U.S. 87, 96-97 (1845) (stating the contractors received the money they were owed).
[107] CRA History at 10, https://tinyurl.com/ye24zmcj.

appendix because it involved a refusal by an executive branch official to make a statutorily required payment — very nearly the definition of "impoundment."[108] Moreover, *Kendall* is not just legal precedent rejecting a constitutional justification for an impoundment. It is also early constitutional history demonstrating that when Congress requires expenditure, the executive branch must follow Congress's instructions.

- CRA alleges that **President Buchanan** "withheld funds that had been appropriated to construct public buildings in Illinois in order to punish the State's congressional delegation for opposing the administration's objectives."[109] This claim appears to rest on a single source: an 1861 speech given by Sen. Stephen Douglas of Illinois, who accused Buchanan on the Senate floor of withholding the building construction funds because of a "quarrel" with the representatives from Illinois.[110] CRA cites no source that speaks to any legal justification offered by the president for his action. But Douglas's floor speech makes clear that Congress did not acquiesce. Douglas repeatedly called the president's action unlawful — explicitly stating that Buchanan "disobeyed the law" — and seemed determined to rectify the situation.[111] Moreover, this incident is the only example that CRA cites of a president impounding funds during the nearly 40-year period from 1838 to 1876. Thus, it provides no support to the idea that there was a "systematic, unbroken, executive practice" of impoundment, "long pursued to the knowledge of the Congress and never before questioned."[112]

- Finally, although **President Grant** indeed impounded funds, he justified the action on statutory, not constitutional, grounds. "After signing the Rivers and Harbors Bill of 1876," CRA writes, "President Grant sent a special message to Congress in which he stated that he did not intend to spend the total amount appropriated because certain appropriations were for 'works of purely private or local interest,' and that '[u]nder no circumstances will I allow expenditures upon works not clearly national.' ... Pursuant to the President's order, the Secretary of War refused to spend over half of the $5 million appropriated for internal improvements."[113] In response, the House of Representatives passed a resolution requesting that the president "state under what law or authority these orders and limitations upon said act of Congress were made."[114] In a letter to Congress, Grant's secretary of war, J.D. Cameron, explained the legal rationale, relying principally on two statutory arguments (and making no reference to the Constitution).[115] He starts by saying that "the law and authority are found in the Act itself," and continues to argue that: (1) the law does not make it "mandatory" for the secretary of war to

[108] See A8.
[109] CRA History at 11, https://tinyurl.com/ypyt2dbp.
[110] Cong. Globe, 36th Cong., 2d Sess. 1177 (1861), https://tinyurl.com/muhe8e6v
[111] Douglas stated that the president "disobeyed the law;" that "[t]o this hour, you could not get the law executed;" and that "the obstinancy of a hostile Executive refused to obey the law and execute it." *Id*.
[112] *See Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).
[113] CRA History at 11-12, https://tinyurl.com/ypyt2dbp; *see* Special Message from President Ulysses S. Grant to the House of Representatives (Aug. 14, 1876), https://tinyurl.com/yc7n6sc4.
[114] 5 Cong. Rec. H374 (daily ed. Dec. 23, 1876), https://tinyurl.com/bdz883bt.
[115] Letter from Secretary of War J.D. Cameron to President Grant (Jan. 11, 1877), *in Executive Documents of the House of Representatives*, 44th Cong., 2d Sess., Exec. Doc. No. 23, at 2-3 (1877), https://tinyurl.com/5dfuawdk.

"expend the full amount," and practical considerations make it necessary for him not to; and (2) the appropriations are "indefinite" (meaning they did not expire) and therefore could be spent in the future.[116] That the secretary relied on statutory arguments is notable, as it amounts to an effort to explain that Congress itself permitted the administration's action. Nonetheless, Cameron's statutory arguments are unconvincing. The underlying appropriation stated that "[i]t shall be the duty of the Secretary of War to apply the moneys herein appropriated as far as may be by contract, except when specific estimates cannot be made for particular work, or where, in the judgment of said Secretary, the work cannot be contracted at prices advantageous to the Government ...."[117] Although this allowed, in specified circumstances, for expenditure of less than the full amount appropriated for individual river and harbor improvements, Grant stated that he would not spend any money on "works of purely private or local interest."[118] The underlying statute did not give the president the authority to do this. The fact remains, however, that Grant did not assert any constitutional authority to withhold the funds, and Congress directly challenged his failure to execute the appropriation.

These examples are at once few in number and thin in nature, undermining any suggestion of a continuous practice of presidents defying Congress, particularly during the nation's first hundred years. Moreover, it is significant that in two of these five instances, presidents justified their noncompliance with appropriations laws either out of a desire to better ascertain Congress's intent (Jefferson) or on statutory grounds (Grant). They strove, in other words, to avoid the appearance of defying Congress. And in the only instance where a president's defiance of Congress was resolved through litigation, the president (Jackson) resoundingly lost.

FDR's Impoundments, His Reluctant Constitutional Defense of Them, and Congress's Response

Among the evidence that CRA offers, FDR is the only president, prior to Nixon, who impounded funds on multiple occasions in avowed defiance of statute.[119] And Roosevelt's administration did reluctantly assert that he had the constitutional authority to do so. However: (1) all but one of Roosevelt's impoundments in defiance of statute occurred during World War II, when concerns about the war effort likely overcame reservations about exceeding statutory limits;[120] (2) his administration defended these actions first on statutory grounds, before reluctantly offering a constitutional justification; (3) members of Congress did not acquiesce to these impoundments, but rather vehemently and repeatedly objected to them; and (4) after the war, rather than continue to assert any constitutional power to impound, the Bureau of the Budget affirmatively asked Congress to pass a law allowing it to hold funds in reserve in certain circumstances,

[116] *Id*.
[117] Act of Aug. 14, 1876, ch. 267, 19 Stat. 132, 138, https://tinyurl.com/5n9ata7s.
[118] Special Message from President Ulysses S. Grant to the House of Representatives, *supra*, https://tinyurl.com/yc7n6sc4.
[119] See A14-A25 (Roosevelt appendix entries).
[120] The sole outlier is a 1938 impoundment of funds Congress appropriated for Reserve Officers' Training Corps Units. See A14-A15. There is no evidence that the Roosevelt administration offered any constitutional justification for that impoundment.

which Congress ultimately did in 1950. Collectively, then, even these examples cannot bear the weight put on them to support an inherent presidential power to impound.

- **All but one of Roosevelt's impoundments in defiance of statute occurred during World War II, when concerns about the war effort likely overcame reservations about exceeding statutory limits**. In successive budget messages to Congress in 1941-1943, Roosevelt outlined a program "for the total defense of our democracy."[121] After the United States entered the war, this required orienting both defense and non-defense spending to the sole objective of military victory.[122] To do this, Roosevelt sought to adjust expenditures for and defer work on an array of programs, including certain public works projects and pieces of highway construction, deemed nonessential to the war effort.[123] The administration's impoundment of funds for two flood control projects illustrates this approach. In the Flood Control Act of 1941, Congress directed the construction, "as speedily as may be consistent with budgetary requirements," of a flood control reservoir in Markham Ferry, Oklahoma, and a levee on the Arkansas River near Tulsa, Oklahoma.[124] In subsequent appropriations acts, Congress included $1.5 million for the Markham Ferry project and $513,000 for the Tulsa levee project.[125] In early 1942, the Bureau of the Budget placed the funds for these projects in reserve, blocking their expenditure.[126] In a letter to the War Department, Budget Director Harold Smith justified holding those funds in reserve because "[n]either of these projects have as yet been designated as of sufficient importance to the national defense to be constructed at the present time."[127]

---

[121] President Franklin Roosevelt, Annual Budget Message to Congress (Jan. 3, 1941), https://tinyurl.com/bpc5m252; President Franklin Roosevelt, Annual Budget Message to Congress (Jan. 5, 1942) ("1942 Budget Message"), https://tinyurl.com/4j3k77df; President Franklin Roosevelt, Annual Budget Message to Congress (Jan. 6, 1943) ("1943 Budget Messsage"), https://tinyurl.com/j4dnpf6y.
[122] 1943 Budget Message, https://tinyurl.com/j4dnpf6y.
[123] *See, e.g.*, 1942 Budget Message, https://tinyurl.com/4j3k77df ("The public works program is being fully adjusted to the war effort .... Federal aid for highways will be expended only for construction essential for strategic purposes. Other highway projects will be deferred until the postwar period. For all other Federal construction I am restricting expenditures to those active projects which cannot be discontinued without endangering the structural work now in progress.").
[124] Pub. L. No. 77-228, ch. 377, § 3, 55 Stat. 638, 639 (1941), https://tinyurl.com/yj85575s; *id.*, 55 Stat. at 645-46 (Arkansas River Basin projects); *Third Supplemental National Defense Appropriation Bill for 1942: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 77th Cong. 320 (1941), https://tinyurl.com/5n6evw3s (testimony of Sen. Elmer Thomas) (noting "the Markham Ferry proposed power development is authorized for construction by the provisions of Public Law 228, 77th Congress"); 1971 Hearings at 381-82, https://tinyurl.com/5y42nhf5 (testimony of Prof. J.D. Williams) ("A $15.4 million power and flood control reservoir at Markham Ferry on the Grand Neosho River in Oklahoma was also authorized by Public Law 228.").
[125] Pub. L. No. 77-353, ch. 591, 55 Stat. 810, 854 (1941), https://tinyurl.com/mu9uayu3; S. Rep. No. 77-894, at 6 (1941) (noting $1,500,000 for Markham Ferry, Oklahoma, and $300,000 for Tulsa and West Tulsa, Oklahoma, under "Flood control, general"); H.R. Rep. No. 77-1501, at 8 (1941) (Conf. Rep.) (deciding to go with Senate, rather than House, proposal for the flood control appropriation); Pub. L. No. 77-527, ch. 246, 56 Stat. 219, 221-22 (1942), https://tinyurl.com/3vjpkwff; H.R. Rep. No. 77-2041, at 2 (1942) (Conf. Rep.) (noting appropriation of $213,000 for "Tulsa-West Tulsa project, to protect defense industries from floods").
[126] 1971 Hearings at 382-83, https://tinyurl.com/3zz29pm3 (study by Prof. J.D. Williams); *War Department Civil Functions Appropriation Bill, 1944: Hearings Before a Subcomm. of the Senate Comm. on Appropriations*, 78th Cong. 21-22 & n.5 (1943), https://tinyurl.com/3jpdabcf.
[127] Letter from Budget Director Harold Smith to Secretary of War (Feb. 5, 1942), *in Independent Offices Appropriation Bill for 1945: Hearings Before the Subcomm. of the S. Comm. on Appropriations*, 78th Cong. 268-69 (1944), https://tinyurl.com/bdfmj2kt.

- **Though the administration referenced the war effort as it made certain project-specific funding decisions, when the Senate Appropriations Committee pressed for the legal basis for impoundments, the Budget Bureau sought first to justify them on statutory grounds.** In a memorandum to the Senate Appropriations Committee, the Budget Bureau suggested first that the Antideficiency Act permitted it to hold appropriated funds in reserve to prevent expenditures in excess of appropriations and to effect savings.[128] But the Bureau conceded that no "express enactment" allowed the president to block funding for projects, such as the "levee work on the Arkansas River," that "have been authorized and appropriated for if he does not consider them of important value to the military."[129] Such actions, the Bureau asserted, "must be viewed therefore as an exercise by the President (or in his behalf) of the ultimate responsibility and authority vested in him as Chief Executive by article II, section 1, of the Constitution, an authority which includes general administrative control over the officers of the executive departments in the performance of their official duties. See *Myers* v. *United States* (272 U.S. 52, 135)."[130] This defense is noteworthy for several reasons. First, *Myers* had nothing to say about a presidential power to impound, and neither conferred nor acknowledged a free-standing power of "general administrative control" permitting the president to disregard enacted laws. Rather, *Myers* addressed the president's power to remove certain executive officers without Senate approval.[131] Second, at no point in the memorandum did the Budget Bureau invoke the president's power as commander-in-chief — even when answering the Senate's question about the president's authority, during the war, "to set up control over projects that have been authorized and appropriated for if he does not consider them of important value to the military."[132]

- **Members of Congress did not acquiesce to Roosevelt's impoundments**. Lawmakers were outraged by the Bureau's practice of impounding funds, and repeatedly challenged the administration's actions in hearings[133] and floor speeches,[134] and through threatened and enacted legislation. "Now, where is the law," Sen. John Overton asked in a 1943 appropriations hearing, "that authorizes either the Executive or the Bureau of the Budget to impound funds that have been appropriated by Congress?"[135] In an exchange

[128] *See* Memorandum from the Budget Bureau to the Senate Appropriations Committee Concerning the Authority of the Budget Bureau to Set Up Reserves Against Appropriations, in *First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 738-40, https://tinyurl.com/ex8y7td9.
[129] *Id.* at 739-40.
[130] *Id.* at 740.
[131] *Myers v. United States*, 272 U.S. 52, 117, 119, 132 (1926).
[132] *See* Memorandum from the Budget Bureau to the Senate Appropriations Committee Concerning the Authority of the Budget Bureau to Set Up Reserves Against Appropriations, in *First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 738-40, https://tinyurl.com/ex8y7td9.
[133] *See, e.g.*, *First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 336-42, https://tinyurl.com/3dmav2uk (remarks by Sens. Overton, McKellar, and Thomas); *see also, e.g.*, *Departments of State, Justice, and Commerce Appropriation Bill for 1944*, 78th Cong. 56-61 (1943), https://tinyurl.com/53xnnc32 (remarks by Sens. McCarran and White).
[134] *See, e.g.*, 88 Cong. Rec. H3296-98 (daily ed Apr. 2, 1942), https://tinyurl.com/bdezedrk (remarks of Rep. Voorhis concerning the Bureau of the Budget).
[135] *First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 336, https://tinyurl.com/3dmav2uk.

with Budget Director Harold Smith, Sen. Kenneth McKellar reiterated his colleague's question: "Where is the statute that gives you the right to set up in any department, your own or any other, a reserve fund? Will you put your hand on the statute or Executive order? As I told you a while ago, in my mind you are going far beyond the limit of your duties of your office .... There is no law about it that I know of."[136] On at least one occasion, a senator's threat to introduce an amendment requiring the expenditure of frozen funds — for the Tulsa levee project — helped secure their release.[137] And Congress enacted responsive legislation, too, including: a 1943 law prohibiting the impoundment of highway construction funds unless the War Production Board affirmatively found "the use of critical material" for such construction "would impede the conduct of the war";[138] a 1944 law directing the release of funds appropriated for the construction of public roads but impounded;[139] and statutes enacted in 1944 and 1945 to strengthen congressional oversight of and involvement in federal spending decisions by requiring the administration to submit to Congress recommendations for the repeal of funds "deemed no longer required."[140]

- **After the war, the Budget Bureau sought authorization from Congress to withhold funds in some circumstances**. In a 1947 report to Congress, the Bureau of the Budget and the General Accounting Office requested express authority, in the form of an amendment to the Antideficiency Act, to hold funds in reserve in specified circumstances.[141] "[T]here is no general statutory authority," they wrote, "under which appropriated moneys can be reserved or impounded so that they may be returned to the Treasury."[142] In a draft bill accompanying the report, the pair proposed allowing the Bureau to establish reserves "to provide for contingencies, or to effect savings

[136] *Id.* at 338.
[137] *See id.* at 340 (remarks of Sen. Elmer Thomas) ("So on one bill I raised the issue, and I introduced an amendment directing the Budget Bureau to release those funds and I submitted the amendment on that to the committee at that time ...."); 1971 Hearings at 385-86, https://tinyurl.com/yuufc573 (mentioning threatened introduction of an amendment that "would have required the Budget Bureau to release $513,000 of impounded funds for the Tulsa-West Tulsa project," and that the "[r]eaction within the Budget Bureau indicated that [the] threat was not taken lightly"); *War Department Civil Functions Appropriation Bill, 1944: Hearings*, *supra*, at 21-22 & n.7, https://tinyurl.com/3jpdabcf (table noting release of impounded Tulsa project funds).
[138] Pub. L. No. 78-146, ch. 236, § 9, 57 Stat. 560, 563 (1943), https://tinyurl.com/36abb3eu. This flipped the presumption that a project might be blocked, and funds for it impounded, merely if it had not been found to be essential to the war effort. *See, e.g.*, Letter from Budget Director Harold Smith to Secretary of War (Feb. 5, 1942), *in Independent Offices Appropriation Bill for 1945: Hearings*, *supra*, at 268-69, https://tinyurl.com/bdfmj2kt (noting impoundment of funds because "[n]either of these projects have as yet been designated as of sufficient importance to the national defense to be constructed at the present time"); 1942 Budget Message, https://tinyurl.com/4j3k77df ("Federal aid for highways will be expended only for construction essential for strategic purposes.").
[139] Pub. L. No. 78-358, ch. 286, 58 Stat. 361, 371 (1944), https://tinyurl.com/ytwbrrwc.
[140] Second Deficiency Appropriation Act of 1944, Pub. L. No. 78-375, ch. 304, § 303, 58 Stat. 597, 623 (1944), https://tinyurl.com/dvuckvun; Pub. L. No. 79-132, ch. 271, 59 Stat. 412, 416 (1945), https://tinyurl.com/mvdcmdxe (requiring, "in addition to compliance with the provisions of section 303 of the Second Deficiency Appropriation Act, 1944," that "there shall be submitted to the Congress on January 3, 1946, a list showing the condition of the balances of each of such appropriations and contract authorizations together with recommendations for the repeal of such of those funds ... deemed no longer required").
[141] U.S. Bureau of the Budget & U.S. Gen. Accounting Off., B-66949, *Report and Recommendations by the Director of the Bureau of the Budget and the Comptroller General of the United States With Respect to the Antideficiency Act and Related Legislation and Procedures* (June 5, 1947), https://tinyurl.com/yhdcwhpk (proposed bill language starting at PDF pages 37-38).
[142] *Id.* at 14.

whenever savings are made possible by or through changes in quantitative or personnel requirements, greater efficiency of operations, or other developments subsequent to the date on which the appropriation was made available."[143] Though Congress did not take action on that proposal in 1947, it did three years later. In the General Appropriations Act of 1951, Congress enacted a modified version of the 1947 language, permitting the establishment of reserves "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which the appropriation was made."[144] In clarifying the Budget Bureau's authority, Congress also narrowed it — foreclosing the use of the apportionment process to withhold funds for entire projects, as Roosevelt had done during the war.

In short, even though Roosevelt impounded funds in defiance of law, his administration attempted first to justify those actions on statutory grounds; faced sustained pushback from Congress; and soon essentially acknowledged that it lacked statutory authorization for the actions it took during the war. No wisp of any constitutional argument remained. Far from unquestioned, then, Roosevelt's defiance of spending laws emerges as a fiercely contested episode of relevant history.

When Truman and Kennedy Offered Constitutional Justifications for Their Actions, Those Actions Actually Were Authorized by Statute

CRA identifies several other instances in which presidents pointed to their constitutional power either to justify impounding funds or to push back against draft legislative text directing the executive branch to spend a particular sum of money. In 1949, after Congress appropriated funds to support more Air Force groups than the White House had requested,[145] Truman impounded the additional funds.[146] Truman's defense secretary justified the action on constitutional grounds,[147] and Truman himself asserted that "if the president "doesn't feel like the money should be spent, I don't think he can be forced to spend it"[148] — defenses CRA characterizes as "the most notable examination of the constitutional issue."[149] Over a decade

[143] *Id.* (proposed bill language on PDF page 38), https://tinyurl.com/3s2z4cec.
[144] Pub. L. No. 81-759, ch. 896, § 1211, 64 Stat. 595, 765-66 (1950), https://tinyurl.com/mvx8×3xa.
[145] H.R. Rep. No. 81-417, at 30-36 (1949) (House report on National Military Establishment Appropriation Act, 1950); S. Rep. No. 81-745, at 31-32 (1949) (Senate report on the same); H.R. Rep. No. 81-1454, at 2 (1949) (Conf. Rep.) (noting compromises between House and Senate proposals); Pub. L. No. 81-434, ch. 787, 63 Stat. 987, 1013-17 (1949), https://tinyurl.com/c3tt3tnt.
[146] Presidential Statement on Signing the National Military Establishment Appropriation Act, 1950 (Oct. 29, 1949), *in* 1971 Hearings at 524-25, https://tinyurl.com/537v7y3r (Truman announced he was "directing the Secretary of Defense to place in reserve the amounts provided by the Congress ... for increasing the structure of the Air Force."); Letter from President Truman to Defense Secretary Louis Johnson (Nov. 8, 1949), *in* 1971 Hearings at 525, https://tinyurl.com/bd9ra8en.
[147] *Department of Defense Appropriations for 1951: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 81st Cong. 54-55 (1950), https://tinyurl.com/4wc5ns5j (exchange between Rep. Mahon and Defense Secretary Johnson).
[148] President's News Conference of Sept. 28, 1950, 1 Pub. Papers 661 (1950), https://tinyurl.com/3fm99yu2.
[149] CRA at 15, https://tinyurl.com/36y8m9s8.

later, President Kennedy impounded funds Congress appropriated for the B-70 bomber.[150] And he subsequently objected to legislative language that would have directed the Air Force to spend more on the program.[151] CRA argues that Kennedy's objection "forcefully rebuffed" Congress's "attempt to encroach on his executive power."[152] But while Truman and Kennedy both pointed to their constitutional power in these instances, their actions were actually consistent with the laws Congress passed. Those actions, and the constitutional arguments made in support of them, therefore are not evidence of an inherent presidential impoundment power.

President Truman

When Truman impounded funds appropriated for additional Air Force groups beyond the number he had requested (58 versus 48), he and his defense secretary defended the action on constitutional grounds on two separate occasions. In testimony before the House Appropriations Committee, Defense Secretary Louis Johnson asserted that "the power" to impound the additional Air Force funds "is vested in the President as Commander in Chief."[153] And later in 1950, when a reporter asked President Truman why he did not spend the money, he responded: "It wasn't necessary. It was not necessary .... That is the discretionary power of the President. If he doesn't feel like the money should be spent, I don't think he can be forced to spend it."[154]

Despite this sweeping pronouncement, Truman's impoundment was expressly authorized by the underlying appropriations law, the 1950 National Military Establishment Appropriation Act.[155] At the House's urging, that law increased the amounts available in several appropriations to fund 58 Air Force groups.[156] Those appropriations were: construction of aircraft and related procurement ("an amount not to exceed $1,992,755,000" for contracts); special procurement ($134,477,000); maintenance and operations ($1,199,792,000); research and development ($233,000,000, "to remain available until expended"); and contingencies ($15,200,000 for "emergencies and extraordinary expenses").[157] However, because the Senate continued to

[150] Jack Raymond, *Pentagon Orders 780-Million Cut in Air Programs*, N.Y. Times (Oct. 28, 1961), https://tinyurl.com/6j2utxry.
[151] Letter from President Kennedy to Rep. Vinson (Mar. 20, 1962), *in* 1971 Hearings at 526, https://tinyurl.com/2e92bher.
[152] CRA History at 17-18, https://tinyurl.com/3a2hzh3a.
[153] *Department of Defense Appropriations for 1951: Hearings*, *supra*, at 54-55, https://tinyurl.com/4wc5ns5j (exchange between Rep. Mahon and Defense Secretary Johnson).
[154] President's News Conference of Sept. 28, 1950, 1 Pub. Papers, *supra*, at 661, https://tinyurl.com/3fm99yu2.
[155] Pub. L. No. 81-434, 63 Stat. at 1013-17, https://tinyurl.com/c3tt3tnt.
[156] H.R. Rep. No. 81-417, *supra*, at 30-36 (noting increases above administration request for the purpose of "increasing the proposed strength to 58 groups"); S. Rep. No. 81-745, *supra*, at 31-32 (table reflecting differences between administration, House, and Senate proposals for Air Force appropriations); H.R. Rep. No. 81-1454, *supra*, at 2 (Conf. Rep.) (noting compromises between House and Senate proposals).
[157] H.R. Rep. No. 81-1454, *supra*, at 2 (Conf. Rep.); Pub. L. No. 81-434, 63 Stat. at 1013-17, https://tinyurl.com/c3tt3tnt (enacted appropriations reflecting House-proposed levels for construction of aircraft and related procurement, special procurement, maintenance and operations, research and development, and contingencies). CRA claims that the Senate agreed to the higher amounts that the House sought for additional Air Force groups "on the express understanding that the President retained inherent impoundment power." CRA History at 15-16, https://tinyurl.com/4kambfft. Nothing in the legislative history or other historical records suggests the Senate held this view, let alone provides an express statement of it. The secondary source CRA cites for its

oppose the funding increases, the final bill included a compromise: it gave the administration discretion in two key places. First, it provided that the Air Force could spend "an amount not to exceed $1,992,755,000" on construction of new aircraft, thereby permitting the expenditure of less than that amount. And the final bill included a provision — section 702 — reducing the amount the Air Force could spend under its appropriations for special procurement and maintenance and operations. Section 702 provided that "amounts to be obligated or expended" under those headings "shall not exceed" $125,797,000 and $1,143,858,000, respectively, permitting expenditures below those amounts.[158] Thus, when Truman impounded some funds under each of those appropriations,[159] his actions were consistent with the underlying statute.

Similarly, when the administration impounded portions of funds appropriated for research and development and contingencies,[160] those actions also were permitted by the statute. Because the research and development appropriation was "to remain available until expended,"[161] the administration did not have to spend the full amount appropriated in a single fiscal year. (It nonetheless spent most of that money, reporting only $36 million of the originally appropriated $233 million left over at the end of the fiscal year.[162]) And because the contingencies appropriation was intended only for "emergencies and extraordinary expenses," and required the Air Force secretary to sign off on any expenditures, the statute gave the Air Force discretion to spend less than the full amount appropriated.[163] Far from defying Congress, then, Truman's actions were consistent with the text of the appropriations — and the compromise struck between a House that wanted more Air Force groups and a Senate that wanted fewer.

Furthermore, just as Truman's broad statement that if the president "doesn't feel like the money should be spent, I don't think he can be forced to spend it," did not result in defiance of the 1950 National Military Establishment Appropriation Act, it appears not to have shaped his broader approach to executing appropriations laws. In other instances where Truman impounded funds,

---

claim does not mention the Constitution. Rather, it quotes Sen. Elmer Thomas, who said that he thought the funds "should be impounded" and that "if the money is appropriated it may not be used." *See* Fisher, *Presidential Spending Power*, *supra*, at 162-63; 95 Cong. Rec. S14355 (daily ed. Oct. 12, 1949), https://tinyurl.com/ythvbf49 (statement of Sen. Thomas). Thomas did not specify a legal basis for a potential impoundment of those funds. But given the discretion that Congress wrote into the appropriations it ultimately enacted, Thomas's remarks cannot, without more, be read as support for a constitutional impoundment power.

[158] Pub. L. No. 81-434, § 702, 63 Stat. at 1024-25, https://tinyurl.com/muewtnf9; H.R. Rep. No. 81-454, *supra*, at 2 (Conf. Rep.) (noting "Amendment No. 100 reduces certain specific appropriations"); 95 Cong. Rec. S14353-55 (daily ed. Oct. 12, 1949), https://tinyurl.com/bdfpa22a (Senate debate over conference committee amendments).

[159] U.S. Bureau of the Budget, Exec. Off. of the President, *Budget of the United States Government for Fiscal Year 1951*, at 745 (1950), https://tinyurl.com/r5ereuzz (noting Truman held $726,151,000 of the "construction of aircraft and related procurement" appropriation in reserve "as a result of [his] determination not to expand the Air Force above the 48-group level"); U.S. Bureau of the Budget, Exec. Off. of the President, *Budget for the Military Functions of the Department of Defense for the Fiscal Year 1952*, at 119-20, 126 (1951), https://tinyurl.com/fm9sx3ha (noting $1.8 million "[u]nobligated balance" for the fiscal year 1950 "maintenance and operations" appropriation, and $3.5 million "[u]nobligated balance" for the fiscal year 1950 "special procurement" appropriation).

[160] *Budget for the Military Functions of the Department of Defense for the Fiscal Year 1952*, *supra*, at 123, 126, https://tinyurl.com/yc4bmzph (noting $36,320,538 as "[b]alance available in subsequent year" for fiscal year 1950 "research and development" appropriation, and 1,595,508 as the "[u]nobligated balance" for fiscal year 1950 "contingencies" appropriation).

[161] Pub. L. No. 81-434, 63 Stat. at 1015, https://tinyurl.com/2jt5bzek.

[162] *Budget for the Military Functions of the Department of Defense for the Fiscal Year 1952*, *supra*, at 123, https://tinyurl.com/yc4bmzph.

[163] *See* Pub. L. No. 81-434, 63 Stat. at 1017, https://tinyurl.com/4j3knvbe.

he did so consistent with, and not in defiance of, statute.[164] Indeed, in one instance where Truman held up funds Congress appropriated for the construction of a dam, he explicitly noted that he did so pursuant to Congress's instructions: "[I]n view of the legislative history of the provisos in the Kings River item, … I am asking the Director of the Budget to impound the funds appropriated for construction of the project, pending determination of the allocation of costs and the making of the necessary repayment arrangements."[165] When those costs were determined in reports the secretary of war submitted to Congress, Truman released the funds and the project moved forward.[166]

President Kennedy

When Kennedy spent less than the full amount Congress appropriated in 1961 and meant to be used in part for the B-70 bomber (later known as the RS-70), it was similarly because he had the discretion to do so under the relevant appropriation statute — which did not address the bomber specifically and provided that the relevant funds would "remain available until expended," meaning they did not have to be spent in full that year.[167] Kennedy later cited his power as "Commander in Chief" under the Constitution not to defend this impoundment, but rather to push back against language the House Armed Services Committee sought to include in a 1962 defense authorization bill to compel him to spend more on the system. The House-proposed language would have "directed" the Air Force secretary "to utilize an authorization in an amount not less than $491,000,000 during Fiscal Year 1963 to proceed with production planning and long leadtime procurement for an RS-70 weapon system."[168] In a letter to the committee's chair, Rep. Carl Vinson, Kennedy objected to the use of the word "directed," suggesting instead that "the word 'authorized' would be more suitable to an authorizing bill (which is not an appropriation of funds) and more clearly in line with the spirit of the Constitution."[169] To preserve the Constitution's "clear separation of legislative and executive powers," Kennedy continued, "I must, therefore, insist upon the full powers and discretions essential to the faithful execution of my responsibilities as President and Commander in Chief, under article II, sections 2 and 3, of the Constitution."[170]

---

[164] A25-A32.
[165] Statement by the President Concerning Plans for Development of California's Water Resources (May 3, 1946), https://tinyurl.com/ymr3txyr; *see* Pub. L. No. 79-374, ch. 247, 60 Stat. 160, 163 (1946), https://tinyurl.com/yc8949pd (noting that "none of the appropriation for the Kings River and Tulare Lake project, California, shall be used for the construction of the dam until the Secretary of War has received the reports as to the division of costs between flood control, navigation, and other water uses").
[166] H. Doc. No. 80-136, Report on Allocation of Costs of King River and Tulare Lake Project, California, at 1-2 (Jan. 31, 1947); Fisher, *Presidential Spending Power*, *supra*, at 166.
[167] A40-A42; Pub. L. No. 87-144, 75 Stat. 365, 374 (1961), https://tinyurl.com/5n9abct9 (appropriating $2.4 billion for "Research, Development, Test, and Evaluation, Air Force"); H.R. Rep. No. 87-873, at 7 (1961) (Conf. Rep.) ("The Committee of Conference is in agreement that $400,000,000 of this [Research, Development, Test, and Evaluation, Air Force] appropriation shall be available for the B-70 program.").
[168] H.R. Rep. No. 87-1406, at 1 (1962).
[169] Letter from President Kennedy to Rep. Vinson (Mar. 20, 1962), *in* 1971 Hearings at 526, https://tinyurl.com/2e92bher.
[170] *Id*.

Though Kennedy's constitutional objection was forceful, he did not, in his general reference to the "powers and discretions" of the president, explicitly assert an inherent power to impound. And he wrote only that the use of the word "directed" would violate the "spirit of the Constitution," not its letter.[171] Indeed, Kennedy conceded that while "unwise," a "legislative effort to 'direct' the Executive" is "not impossible."[172] But recognizing the importance of "comity" between the branches, Kennedy both acknowledged that it was "incumbent upon the Executive to give every possible consideration … to the views of the Congress" and offered an accommodation: Defense Secretary Robert McNamara would be willing to "reexamine the RS-70 program and related technological possibilities."[173]

In addition to the substance of Kennedy's letter to Vinson, the timing of it is notable. The president did not attempt to intervene after Congress enacted the authorization bill, but rather through a request for a change in bill text prior to its enactment. In other words, Kennedy took steps to avoid being in a position to defy a statutory directive from Congress. The president's intervention ultimately won the day. The final defense authorization bill "authorized," but did not direct, an appropriation of $491 million "for the production planning and long leadtime procurement of an RS-70 weapon system."[174] The president and Congress therefore avoided a direct confrontation, and Kennedy did not defy any enacted law.[175]

Since Congress Passed the Impoundment Control Act, Trump Is the Only President to Assert An Inherent Power to Impound

For CRA, the relevant history of impoundments ends in 1974. That year, Congress passed the Impoundment Control Act, further limiting when the president may impound funds to only two scenarios: deferrals, or temporary delays in spending, and proposed rescissions, where the president suggests cancellations of funds to Congress.[176] As one scholar notes, "[d]espite asserting that the [ICA] 'represented an unprecedented break with the Nation's constitutional history and traditions,' [CRA] halts its historical survey with the statute's enactment and thus identifies no post-enactment practice supporting its theory."[177] That omission is not surprising, because the history since 1974 further undermines the notion that presidential practice supports the existence of an inherent power to impound.

Since Nixon resigned and Congress passed the ICA, Trump is the only president to have asserted an inherent constitutional power to impound. None of the other eight subsequent Republican and Democratic presidents — Gerald Ford, Jimmy Carter, Ronald Reagan, George

[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] Pub. L. No. 87-436, 76 Stat. 55, 55 (1962), https://tinyurl.com/5n98vhu2.
[175] *See* Price, *The President Has No Constitutional Power of Impoundment*, *supra*, https://tinyurl.com/247j95un.
[176] Congressional Budget & Impoundment Control Act of 1974, Pub. L. No. 93-344, tit. X, 88 Stat. 297, 332-39 (1974), https://tinyurl.com/5xn329ve (now codified at 2 U.S.C. §§ 682-88); *see* Pub. L. No. 100-119, §§ 206-07, 101 Stat. 754, 785-86 (1987), https://tinyurl.com/4at5tabs (amending and reaffirming two of the ICA's provisions).
[177] Price, *The President Has No Constitutional Power of Impoundment*, *supra*, https://tinyurl.com/247j95un.

H.W. Bush, Bill Clinton, George W. Bush, Barack Obama, and Joe Biden — has asserted the power that Trump now claims.

It is notable that Presidents Ford and Reagan, in particular, did not assert this power. In litigation and a signing statement, respectively, both presidents challenged the constitutionality of the section of the ICA empowering the Government Accountability Office (GAO) to sue the executive branch to release impounded funds.[178] But even as Ford and Reagan aired this constitutional objection, neither president raised the broader challenge Trump now does: that the ICA as a whole is unconstitutional because it encroaches on the president's supposed inherent power not to spend appropriated funds.

Trump himself discovered this constitutional power to impound only recently. Although Trump's first term featured both an impoundment of funds Congress appropriated for Ukraine and repeated threats to cancel billions of dollars in foreign aid,[179] the administration defended these actions primarily on statutory grounds.[180] Trump's hold on funds for Ukraine did not violate the ICA, the Office of Management and Budget (OMB) argued, because the hold was a permissible "programmatic delay," rather than an action prohibited by the statute.[181] And Trump's threats to cancel foreign aid turned on the "text of the Impoundment Control Act," which OMB asserted allowed "the President to propose [rescissions] and withhold funds at any time in a fiscal year."[182]

---

[178] Points & Auths. in Supp. of Defs.' Mot. to Dismiss at 3-13, *Staats v. Ford*, No. 75-cv-00551 (D.D.C. June 16, 1975), https://tinyurl.com/287vac9d (The cause of action "violates the Constitution in two ways. First, by authorizing the Comptroller General, a legislative officer, to perform the executive function of enforcing the law, the provision runs afoul of the constitutional separation of powers. Secondly, by in effect authorizing the Congress to sue the Executive, the United States appears on both sides of this action and no justiciable case or controversy is presented within the meaning of Article III."); Statement on Signing H.J. Res. 324 Into Law, 23 Weekly Comp. Pres. Doc. 1091 (Oct. 5, 1987) ("First, the Supreme Court's recent decision in *Bowsher v. Synar*, which struck down portions of the original Gramm-Rudman-Hollings law, makes clear that the Comptroller General cannot be assigned Executive authority by the Congress. In light of this decision, section 206(c) of the joint resolution, which purports to reaffirm the power of the Comptroller General to sue the executive branch under the Impoundment Control Act, is unconstitutional. It is only on the understanding that section 206(c) is clearly severable from the rest of the joint resolution, under the reasoning of the Supreme Court's 1987 decision in *Alaska Airlines v. Brock*, that I am signing the joint resolution with this constitutional defect."). OMB General Counsel Mark Paoletta has similarly argued that the ICA's cause of action is unconstitutional. *See* Mark Paoletta & Daniel Shapiro, *Trump is right about the Impoundment Control Act — it's unconstitutional*, The Hill (June 24, 2024), https://tinyurl.com/yw88bbhv.

[179] *See* GAO, B-331564, *Office of Management and Budget — Withholding of Ukraine Security Assistance* (Jan. 16, 2020), https://tinyurl.com/nhea99ck; Carol Morello & Karoun Demirjian, *Trump administration is considering pulling back $3 billion in foreign aid*, Wash. Post (Aug. 16, 2018), https://tinyurl.com/8a5mycvw; John Bresnahan et al., *Trump kills plan to cut billions in foreign aid*, POLITICO (Aug. 22, 2019), https://tinyurl.com/syarw7en.

[180] GAO, *Withholding of Ukraine Security Assistance*, *supra*, at 7, https://tinyurl.com/4c65xdh2; GAO, B-330330, *Impoundment Control Act — Withholding of Funds Through Their Date of Expiration* 8-9 (Dec. 10, 2018), https://tinyurl.com/3d7rzzbk (explaining OMB's argument that the ICA "does not preclude an impoundment from persisting through the date on which amounts would expire"); *see* Letter from OMB Dir. Russell Vought & OMB Gen. Couns. Mark Paoletta to Rep. John Yarmuth, Chair, House Comm. on Budget, at 3-4 (Jan. 19, 2021), https://tinyurl.com/4npzsp45 (citing the ICA and Antideficiency Act to defend actions both taken and contemplated).

[181] GAO, *Withholding of Ukraine Security Assistance*, *supra*, at 7, https://tinyurl.com/4c65xdh2.

[182] Letter to Tom Armstrong, GAO Gen. Couns., from Mark Paoletta, OMB Gen. Couns., at 4 (Nov. 16, 2018), https://tinyurl.com/3cf46rwj; GAO, *Withholding of Funds Through Their Date of Expiration*, *supra*, at 8-9, https://tinyurl.com/3d7rzzbk.

It was only at the end of Trump's first term that the administration began to escalate its assertions of authority to impound. In a letter that OMB Director Russell Vought and OMB General Counsel Mark Paoletta sent to Congress, the pair decried "interpreting the ICA in a manner" that would "sanction a Legislative encroachment upon the President's constitutional authority to faithfully execute the laws."[183] But they continued to argue that the "temporary pauses" in spending sometimes required by faithful execution were in accordance with the ICA, not in defiance of it, because they "constitute programmatic delays, not impoundments."[184] Not until June 2023 did Trump explicitly and publicly claim an inherent power to impound. In a campaign video, Trump vowed to "use the president's long-recognized Impoundment Power to squeeze the bloated federal bureaucracy for massive savings," and promised to "challenge the Impoundment Control Act in court."[185]

Trump's threat to challenge the ICA in court and his actions since taking office to defy the law through a thicket of executive orders, memoranda, and agency actions to freeze and cancel federal funds[186] stand in stark contrast to past administrations' compliance with the ICA.[187] That compliance has not been perfect. But on the limited number of occasions when past administrations unlawfully impounded funds and GAO pushed them to release the money in compliance with the law, presidents have uniformly backed down. This was the case in 1975, for example, when GAO sued the Ford administration for impounding $264.1 million needed to implement the Home Ownership Assistance Program.[188] In an internal memorandum, Secretary of Housing and Urban Development (HUD) Carla Hills recommended releasing the impounded funds because "it is the belief of HUD's General Counsel, trial counsel in the Civil Division of the

[183] Letter from OMB Dir. Russell Vought & OMB Gen. Couns. Mark Paoletta, *supra*, at 5-6 https://tinyurl.com/4npzsp45.
[184] *Id.* at 3.
[185] Donald J. Trump, *Using Impoundment to Cut Waste, Stop Inflation, and Crush the Deep State*, Agenda47 (June 20, 2023), https://tinyurl.com/yc6cf28f.
[186] *E.g.*, Unleashing American Energy, Exec. Order No. 14,154, 90 Fed. Reg. 8353 (Jan. 20, 2025), https://tinyurl.com/yc63veh9; Reevaluating and Realigning United States Foreign Aid, Exec. Order No. 14,169, 90 Fed. Reg. 8619 (Jan. 20, 2025), https://tinyurl.com/yc398e7k; Withdrawing the United States From the World Health Organization, Exec. Order. No. 14,155, 90 Fed. Reg. 8361 (Jan. 20, 2025), https://tinyurl.com/4pufek3h; Memorandum from Matthew Vaeth, Acting Dir., U.S. Off. of Mgmt. & Budget, to Heads of Exec. Dep'ts & Agencies, Regarding Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs (Jan. 27, 2025), https://tinyurl.com/mr3xx2e3 (since rescinded); Jeremy Herb et al., *'People are just flipping out': Billions in federal funding remain frozen despite court orders to keep the taps open*, CNN (Feb. 13, 2025), https://tinyurl.com/m2zfj8w7 (describing agency actions to freeze federal funds); Press Release, Sen. Patty Murray, Vice Chair, U.S. Senate Comm. on Appropriations, Week 4: Trump's Funding Freeze Continues, at 2-3 (Feb. 15, 2025), https://tinyurl.com/fh58htru (table outlining funding "illegally withheld" by Trump administration).
[187] *See, e.g.*, Price, *Funding Restrictions and Separation of Powers*, *supra*, at 435 n.281, https://tinyurl.com/msxspuax (collecting sources on executive compliance with the ICA); Chafetz, *supra*, at 65 ("The Impoundment Control Act's checks have generally been effective, with studies finding that presidents have largely adhered to the act's requirement to report impoundments and that presidents have released funds when required to."); Wm. Bradford Middlekauff, Note, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 Yale L.J. 209, 218-19 & nn. 52-54 (1990), https://tinyurl.com/yyshe23f ("The Comptroller General has found few situations since passage of the ICA where the executive branch has not reported an impoundment. In addition, the Comptroller General has not had to reclassify deferrals as rescissions or vice versa with any degree of regularity. With respect to the release of deferred funds, a Special Assistant to the Comptroller General has testified that the Comptroller General's 'monitoring experience and a review of the record indicate no pattern or practice of refusal or failure to release deferred funds in a timely manner'" (footnotes omitted).).
[188] Compl. ¶ 17, *Staats v. Ford*, No. 75-cv-00551 (D.D.C. Apr. 15, 1975), https://tinyurl.com/mwe86969; 120 Cong. Rec. H34116 (Oct. 7, 1974), https://tinyurl.com/3pt525k2 (noting the submission of Ford's special message).

Department of Justice and the Solicitor General that the GAO is likely to prevail."[189] The Ford administration subsequently released the money, reactivated the Home Ownership Assistance Program, and settled the lawsuit with GAO.[190]

Under Reagan, a threat by GAO to sue was enough to prompt the administration to release frozen funds. In 1986, the comptroller general twice notified Congress of his intent to sue the administration — first, over funds appropriated for the Strategic Petroleum Reserve[191] and, second, over budget authority made available to the Maritime Administration and the Urban Mass Transportation Administration.[192] In both cases, the administration released the money.[193] In neither instance did it raise purported constitutional justifications for its actions.

Since the Reagan administration, GAO has not needed to threaten to sue the executive branch to ensure compliance with the ICA.[194] GAO inquiries and comptroller general decisions regarding potential impoundments have been enough to prompt the release of funds.[195] Such was the case at the start of the first Trump administration, when the Departments of Energy and Homeland Security released unlawfully impounded funds after inquiries by GAO.[196] That presidents have largely complied with the ICA thus further undercuts the notion that there is any long-recognized inherent presidential power to impound. From 1974 to 2023 — roughly fifty unbroken years — no president asserted or appears to have acted on such a power.

---

[189] Memorandum from Carla Hills, Sec'y, U.S. Dep't of Hous. & Urban Dev., to L. William Seidman, Exec. Dir., Economic Pol'y Bd., at 1, 4 (Sept. 26, 1975), https://tinyurl.com/2xrcde78.
[190] Stip. Re Dismissal, *Staats v. Lynn*, No. 75-cv-00551 (D.D.C. Nov. 26, 1975), https://tinyurl.com/2fv26kcy.
[191] GAO, *Report to the Chairman, Subcommittee on Environment, Energy, and Natural Resources, Committee on Government Operations, House of Representatives: Oil Reserve—Status of Strategic Petroleum Reserve Activities as of March 31, 1986*, at 9 (Apr. 1986), https://tinyurl.com/2ks4wrxr; 132 Cong. Rec. H3479 (Mar. 4, 1986), https://tinyurl.com/4ptrka3a (noting letter from Comptroller General "transmitting notification of his intention to institute a civil action in the U.S. district court to require that the budget authority for the strategic petroleum reserve be made available for obligation"); H. Doc. 99-173 (Mar. 4, 1986) (notification).
[192] H. Doc. No. 99-192 (Apr. 9, 1986) (comptroller general notification of intent to sue).
[193] GAO, *Status of Strategic Petroleum Reserve Activities*, *supra*, at 9 n.2, https://tinyurl.com/2ks4wrxr; *Impoundment Control Act Use and Impact of Recission Procedures: Hearing before the Subcomm. on Federal Financial Management of the S. Comm. on Homeland Security & Governmental Affairs*, 111th Cong. 2 (2009) ("Poling Statement"), https://tinyurl.com/3csyc9d7 (statement of Susan A. Poling, Managing Assoc. Gen. Couns., GAO Office of Gen. Couns.) ("During the initial years of the ICA, we filed 25-day reports on several occasions .... In each case, the funds were released.").
[194] Poling Statement at 2, https://tinyurl.com/3csyc9d7. Searches we conducted using the HeinOnline electronic database — which houses the entire Congressional Serial Set collection (through 2017) and all GAO reports and comptroller general decisions (through 2008) — returned no post-Reagan administration instances where the comptroller general notified Congress of an intent to sue to release impounded budget authority. Previously, on two occasions, GAO threatened to sue the Ford administration to release impounded funds. But in one case, the Department of Health, Education, and Welfare released the funds in response. S. Doc. No. 94-256 (Sept. 14, 1976). And in another, a court ordered the withholding of housing funds and GAO concluded there was no longer an impoundment. GAO, OGC-77-9, B-115398, *Civil Litigations Concerning the Section 236 Housing Program* (Dec. 23, 1976).
[195] *See, e.g.*, Poling Statement at 5, https://tinyurl.com/hh7wsa9b ("For his budget proposal for fiscal year 2007, the President requested the "cancellation" or rescission of previously appropriated funds from 40 programs, administered by 13 agencies. This time only one agency withheld funds from obligation in violation of the ICA and released the funds after our inquiry.").
[196] GAO, B-329092, *Impoundment of the Advanced Research Projects Agency-Energy Appropriation Resulting from Legislative Proposals in the President's Budget Request for Fiscal Year 2018*, at 1-2 (2017), https://tinyurl.com/37um3ujn; GAO, B-329739, *U.S. Department of Homeland Security — Impoundment Control Act and Appropriations for the Tenth National Security Cutter*, at 8 (2018), https://tinyurl.com/4a4tuzf5.

IV. Conclusion

An imagined presidential power to impound funds deserves no sanction. Every source of authority makes clear that there is no inherent presidential power to impound. It finds no basis in the Constitution's text and structure, which commits the power of the purse to Congress. It finds no support in federal case law, which as early as 1838 rejected an effort to justify on constitutional grounds executive defiance of a spending law. It finds no home even in the legal opinions and precedent internal to the executive branch.

For history to evince an inherent presidential power to impound, it would have to show "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government," such that it "may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."[197] The historical record, even as CRA presents it, reveals no such thing.

Instead, the historical record shows that presidents have largely acted within the bounds of the law, and impounded funds in accordance with their statutory authority. When presidents have impounded funds in defiance of statute, they often have attempted to justify their actions on statutory grounds, as President Grant did. When Presidents Jackson and Nixon pressed their cases in court, making sweeping arguments about their constitutional power to defy spending laws, they resoundingly lost. And even in the case of President Roosevelt, who repeatedly impounded funds in defiance of the law, he first offered a statutory justification before resorting to a constitutional defense. And he faced sustained and vocal pushback from Congress over a period of years.

Far from systematic, unbroken, and never-before-questioned, the "practice" this historical record reveals is one of only sporadic presidential action in defiance of Congress — which both Congress and the courts have countermanded. At many different junctures in American history, these coordinate branches of government (along with lawyers in the executive branch) have rejected the sweeping presidential power to impound now claimed. It therefore "is supported by neither reason nor precedent."[198] And so it should remain.

[197] *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).
[198] *Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools*, 1 Supp. Op. O.L.C., *supra*, at 308, https://tinyurl.com/hf2t2y83.

APPENDIX

A History of Presidential Impoundments

The Center for Renewing America (CRA) argues that the history of presidential impoundments from the founding through the Nixon administration supports the notion that the president has an inherent constitutional power to impound appropriated funds.[1] This appendix examines each alleged example that CRA cites in support of that claim. For each example, we reviewed the relevant appropriations and other statutes, in addition to the sources cited by CRA and other primary and secondary sources, to determine: (1) whether there was, in fact, an impoundment; (2) whether the impoundment was authorized by statute; and (3) if the impoundment appeared not to be authorized by statute, what justification, if any, the president offered for impounding the funds.

Throughout, we relied on the definition of an impoundment offered by the Government Accountability Office (GAO): any "action or inaction by an [executive] officer or employee" that either temporarily or permanently "precludes the obligation or expenditure of budget authority."[2] Budget authority, GAO explains, is "authority provided by federal law to enter into financial obligations that will result in immediate or future outlays [think: payments] involving federal government funds."[3] Such authority often takes the form of appropriations, but may also include authority to enter into contracts or borrow money.[4]

We have grouped alleged impoundments into four categories:

AUTHORIZED	UNAUTHORIZED	UNKNOWN	NOT AN IMPOUNDMENT
The impoundment was permitted by laws passed by Congress.	*The impoundment was not permitted by laws passed by Congress.*	*There was not enough information to assess the alleged impoundment.*	*The action taken by the executive branch was not an impoundment.*

As our paper explains, these examples do not support the contention that the Constitution allows the president to unilaterally impound funds. Even in the few instances reviewed here when presidents have impounded funds without authorization, they have almost always asserted a statutory justification or faced vigorous opposition from Congress or the courts. **To view this appendix as a searchable spreadsheet, visit protdem.org/myth-appx.**

1 *See* Mark Paoletta et al., *The History of Impoundments Before the Impoundment Control Act of 1974* (June 24, 2024) ("CRA History"), https://tinyurl.com/bdedyam6.
2 GAO, GAO-16-464SP, *Principles of Federal Appropriations Law, Chapter 2: The Legal Framework* 2-47 (2016), https://tinyurl.com/4fumbp3y.
3 GAO, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* 20 (2005) ("GAO Glossary"), https://tinyurl.com/2xuepe5d.
4 *Id.* at 20-22.

Overview of Impoundments by Administration

To view this appendix as a searchable spreadsheet, visit protdem.org/myth-appx.

George Washington		PAGE A3
Thomas Jefferson		PAGE A4
James Madison		PAGE A6
Andrew Jackson		PAGE A7
Martin Van Buren		PAGE A8
James Buchanan		PAGE A9
Ulysses S. Grant		PAGE A9
Woodrow Wilson		PAGE A11
Warren G. Harding		PAGE A11
Herbert Hoover		PAGE A13
Franklin D. Roosevelt		PAGE A14
Harry S. Truman		PAGE A25
Dwight D. Eisenhower		PAGE A32
John F. Kennedy		PAGE A40
Lyndon Johnson		PAGE A42

George Washington

1789–97

MILITARY HOSPITAL FUNDS

UNAUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "it was well known that the Executive underspent tens of thousands on hospital department appropriations" during the Washington administration."[5]

This assertion finds its roots in a February 1797 congressional debate recounted in Joseph Gales's *Annals of Congress*.[6] Although CRA does not specify which Washington-era hospital department appropriations were "underspent,"[7] Gales makes specific reference to a 1796 appropriation, which the military reportedly did not spend in full on its hospital department.[8] Our assessment considers this episode.

ASSESSMENT

This impoundment was **not authorized by statute**. After the military spent the portion of the 1796 appropriation it needed to fund its hospital departments, it used the remaining money for other purposes without congressional authorization — an infringement on Congress's power of the purse, but one that even CRA does not argue is constitutional.

In 1796, Congress appropriated $30,000 "[f]or the [military's] hospital department."[9] Gales writes that in a congressional debate, Representative Albert Gallatin, stated that "this year," the hospital department "had cost six thousand nine hundred and five dollars."[10] If true, it would mean the Washington administration did not spend $23,095 of the $30,000 appropriation on hospitals. But Gallatin (as summarized by Gales) did not allege that the money was withheld; he alleged that the military "appl[ied] the surplus to other purposes."[11]

Congress debated how to prevent the military and other government officials from continuing to reallocate excess funds, a practice that Gallatin believed was "making the law a mere farce."[12] Congress substantially decreased the 1797 hospital department appropriation while also providing the executive branch with limited discretion to spend less than the full amount: "a sum not exceeding ten thousand dollars."[13] At Gallatin's urging, Congress also combined some military appropriations "together in one

5 CRA History at 5, https://tinyurl.com/5d8vsuy6.

6 Joseph Gales, *Annals of the Congress of the United States: Fourth Congress, Second Session* 2321 (1849) (statement of Rep. Albert Gallatin), https://tinyurl.com/ycaptp79; CRA History at 5 (citing Lucius Wilmerding, *The Spending Power* 41 (1943)); Wilmerding, *supra*, at 41 & n.34 (citing Gallatin's statement at "6 *Annals*, 2321").

7 CRA History at 5, https://tinyurl.com/5d8vsuy6.

8 Gales, *supra*, at 2321. Gales's account contains some errors. He wrote that it was the "uniform practice of the House to appropriate from thirty to forty thousand dollars" for the hospital department. However, hospital department appropriations in Washington's administration never exceeded $30,000. Congress did not appropriate $40,000 for the hospital department until 1799, during the Adams administration. Act of Mar. 2, 1799, ch. 44, § 1, 1 Stat. 741, 743, https://tinyurl.com/59n5tj6x.

9 Act of June 1, 1796, ch. 51, § 1, 1 Stat. 493, 494, https://tinyurl.com/y8m4yfvs ("For the hospital department, the sum of thirty thousand dollars ....").

10 Gales, *supra*, at 2321, https://tinyurl.com/ycaptp79.

11 *Id.*

12 *Id.* (statement of Rep. Albert Gallatin as summarized by Gales).

13 Act of Mar. 3, 1797, ch., 17, § 1, 1 Stat. 508, 508, https://tinyurl.com/ynpvrueh.

sum,"[14] to provide some discretion to allocate funds between "contingent expenses," while disallowing unlimited transfers.[15]

14 Gales, *supra*, at 2321, https://tinyurl.com/ycaptp79.
15 Wilmerding, *supra*, at 41.

Thomas Jefferson

1801

CONSTRUCTION OF NAVY YARDS

UNAUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, in 1801, "President Jefferson announced that his administration was impounding funds for the construction of shipyards to allow the Republican Congress to reassess these Federalist Era appropriations. Jefferson apparently had no qualms about asserting, almost in passing, the President's impoundment authority on the basis of policy disagreements with previous congressional appropriations."[16]

ASSESSMENT

This impoundment was **not authorized by statute**. But Jefferson did not impound the funds because of "policy disagreements" with Congress. Quite the opposite; he "suspended or slackened" expenditures because he suspected that spending in the prior administration had unlawfully exceeded congressional appropriations.

In 1799, Congress had appropriated $50,000 for the construction of two docks.[17] But Secretary of the Navy Benjamin Stoddert, under President John Adams, had begun purchasing land for the construction of six navy yards,[18] spending over $190,000 on land and improvements, apparently without congressional authorization.[19] In March 1801, Congress appropriated $500,000 for "the expenses attending six seventy-four gun ships, and for completing navy yards, docks, and wharves."[20] This put Jefferson in a legal quandary. Congress had instructed him to "complet[e] navy yards," without specifying the number, and perhaps unaware that land for six navy yards had been purchased instead of the two that were authorized. If Jefferson completed all six, he was potentially furthering defiance of Congress, but the same could be said of withholding the funds.

In December 1801, in his first annual message to Congress, Jefferson announced that he had "suspended or slackened" the expenditure of funds for constructing navy yards so "that the Legislature might determine whether so many yards are necessary as have been contemplated."[21] Jefferson expressed doubt that the prior administration had "perfectly understood" the "authority given by the Legislature."[22] A congressional committee tasked with investigating the matter issued a report five months later finding that

16 CRA History at 8, https://tinyurl.com/bde6dp2a.
17 Acts of Feb. 25, 1799, chs. XV & XVI, 1 Stat. 622 (1799), https://tinyurl.com/3f88f2ek.
18 H.R. Doc. No. 7-28 (1802), *in* Walter Lowrie & Walter Franklin, eds., *American State Papers* 103 (1834), https://tinyurl.com/3hssw3jm; H.R. Doc. No. 7-186, at 2 (1802) (hereinafter Nicholson Report), *in* Walter Lowrie & Matthew St. Clair Clarke, eds., *American State Papers* 753 (1832), https://tinyurl.com/29tcz44x.
19 *Id.*
20 Act of Mar. 3, 1801, § 1, 2 Stat. 122-23, https://tinyurl.com/bdfpfdz2.
21 President Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801), https://tinyurl.com/52m6ajsz.
22 *Id.*

"no authority was given, by law, nor any appropriation made, except for the two docks" and "that four of the navy yards were purchased without authority, and the money misapplied which was paid for them."[23] In 1803, Congress sold one of the navy yards that was purchased unlawfully.[24]

23 Nicholson Report, *supra*, at 2, https://tinyurl.com/29tcz44x.
24 Act of Feb. 10, 1803, ch. IV, 7 Stat. 199, https://tinyurl.com/7kbjs5h4.

Thomas Jefferson

1803

CONSTRUCTION OF GUNBOATS

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, the "most famous early impoundment precedent came in 1803, when Jefferson refused to spend a congressional appropriation of $50,000 for 15 gunboats for use on the Mississippi."[25]

ASSESSMENT

This impoundment was **authorized by statute**. In the underlying appropriation, Congress "authorized and empowered" Jefferson to construct "a number not exceeding fifteen gun boats" using a "sum not exceeding fifty thousand dollars."[26] This statutory language gave Jefferson discretion to determine whether and how much of the funds to spend.[27]

Jefferson's impoundment was only temporary, however. In his fourth annual message to Congress, the president shared that "[t]he act of Congress of 1803 February 28, for building and employing a number of gun boats, is now in a course of execution to the extent there provided for."[28]

25 CRA History at 9, https://tinyurl.com/cjauyje. This case is regularly referenced by Trump and his allies. *See, e.g.*, Donald J. Trump, *Using Impoundment to Cut Waste, Stop Inflation, and Crush the Deep State*, Agenda47 (June 20, 2023), https://tinyurl.com/yc6cf28f; Mark Paoletta & Daniel Shapiro, *The Next POTUS Should Reclaim The Constitutional Spending Power Congress Stole*, The Federalist (June 7, 2024), https://tinyurl.com/3bebu9tr.
26 *See* Act of Feb. 28, 1803, § 3, 2 Stat. 206, https://tinyurl.com/5byhrt3c.
27 Justice Scalia recognized this appropriation as discretionary in a special concurrence. *See Clinton v. City of New York*, 524 U.S. 417, 466-67 (1998) ("From a very early date Congress also made permissive individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion. In 1803, it appropriated $50,000 for the President to build 'not exceeding fifteen gun boats, to be armed, manned and fitted out, and employed for such purposes as in his opinion the public service may require'[.]") (quoting statute).
28 President Thomas Jefferson, Fourth Annual Message (Nov. 8, 1804), https://tinyurl.com/y725cxsf.

Thomas Jefferson

1802–09

CONTINGENCY FUNDS

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "'Jefferson found it unnecessary on repeated occasions to use all of the money provided in a contingency fund' and 'regularly returned the unexpended balance to the Treasury.'"[29]

ASSESSMENT

These impoundments were **authorized by statute**. In 1802, 1805, and 1808, Congress appropriated $20,000 for "defraying the contingent

29 CRA History at 8-9, https://tinyurl.com/bde6dp2a (quoting Louis Fisher, *Presidential Spending Power* 150 (1975)).

expenses of government."[30] None of these statutes required expenditure of the appropriated funds, nor would it have made sense to do so given that Congress provided the funds for contingencies that might, but would not necessarily, arise.

To the extent Jefferson "'regularly returned the unexpended balance to the Treasury,'" it was because he was required to do so by a 1795 law, which provided, with some exceptions, that appropriations both unexpended and expired for more than two years "shall be deemed to have ceased and been determined; and the sum so unexpended shall be carried to an account on the books of the treasury, to be denominated 'The Surplus Fund.'"[31]

30 Act of May 1, 1802, ch. 47, 2 Stat. 184, 188, https://tinyurl.com/mrej99y7; Act of Mar. 1, 1805, ch. 21, 2 Stat. 316, 321, https://tinyurl.com/3a8p85ky; Act of Feb. 10, 1808, ch. 17, 2 Stat. 462, 466, https://tinyurl.com/yz36j79d.

31 Act of Mar. 3, 1795, ch, 45, § 16, 1 Stat. 433, 437, https://tinyurl.com/398p46ff.

James Madison

1809

GUNBOAT CREWS

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[President James] Madison too impounded funds .... In 1809, Madison announced to Congress that he was reducing the crews of gunboats in New Orleans in order to save money that Congress had appropriated."[32]

ASSESSMENT

This impoundment was **authorized by statute**. In the underlying appropriation, Congress "authorized and empowered" the president to employ additional midshipmen and seamen for a "period not exceeding two years," unless he decided to discharge them sooner because "in his judgment their service may be dispensed with."[33] Congress appropriated "a sum not exceeding four hundred thousand dollars" for this end.[34] This language indicates a clear grant of discretion by Congress both to spend less than the full amount appropriated and to employ the crews only insofar as the president, "in his judgment," deemed it necessary.

32 CRA History at 9, https://tinyurl.com/cjauyje; *see* Letter from President James Madison to Congress (May 23, 1809), https://tinyurl.com/ezrf9a9y ("I have thought it not inconsistent with a just precaution, to have the Gun-Boats, with the exception of those at New Orleans, placed in a situation, incurring no expence beyond that requisite for their preservation and conveniency for future service; and to have the crews of those at New Orleans, reduced to the number required for their navigation and safety.").

33 Act of Jan. 31, 1809, § 2, 2 Stat. 514, https://tinyurl.com/h9akfh23.

34 *Id.*

Andrew Jackson

1838

FUNDS OWED TO CONTRACTORS FOR MAIL DELIVERY SERVICES

UNAUTHORIZED

ALLEGED IMPOUNDMENT

In 1836, Congress passed a private relief act that "directed" the solicitor of the treasury to settle the claims of four contract mail carriers for payment for their services, and "directed" the postmaster general to pay the contractors whatever amount the solicitor determined they were owed.[35] The solicitor determined the contractors were owed $161,563.89, but the postmaster general paid them only $122,102.46.[36]

CRA states that this was not an impoundment, only "a contract claim against the government that was adjudicated by Congress" and "involved no discretion."[37] However, because this incident involves the defiance of a clear statutory requirement to pay the contractors a specified sum (the amount that the solicitor of the treasury determined they were owed), this paper treats the refusal to pay the full amount as an impoundment of the unspent funds.

ASSESSMENT

This nonpayment of funds made available by Congress — an impoundment — was **not authorized by statute**. So the Supreme Court held in *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838).

After the postmaster general refused to pay the contractors the full amount they were owed, the attorney general argued before the Supreme Court that the Take Care clause granted the president, and by extension executive branch officials, the discretion to pay less than the full amount that the statute required. The Supreme Court roundly rejected that argument: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."[38] The Court then ordered the postmaster general to pay the contractors the rest of the money they were owed,[39] and the contractors received that money.[40]

35 Act of July 2, 1836, ch. 284, 6 Stat. 665, 665-66, https://tinyurl.com/mr35jpyr.
36 *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 609 (1838).
37 CRA History at 10, https://tinyurl.com/ye24zmcj.
38 *Kendall*, 37 U.S. at 612-13.
39 *Id.* at 609, 626.
40 *Kendall v. Stokes*, 44 U.S. 87, 96-97 (1845).

Martin Van Buren

1803

REFUSAL TO PAY A WIDOW A SECOND PENSION

NOT AN IMPOUNDMENT

ALLEGED IMPOUNDMENT

According to CRA, the secretary of the navy under President Martin Van Buren impounded funds by refusing to pay a widow a second pension.[41]

ASSESSMENT

This action was **not an impoundment**, but rather an adjudication of eligibility for a pension.

On July 10, 1832, Congress made the secretary of the navy the trustee of the Navy pension fund and made it his "duty to receive applications for pensions, and to grant the same according to the terms of the acts of Congress ...."[42] On March 3, 1837, Congress passed a law entitling the widow of any officer who died serving the Navy to receive, from the pension fund, half the monthly salary the deceased officer would have been earning.[43] The same day, Congress passed a special resolution entitling Susan Decatur, the widow of a commodore, to receive a pension from the Navy.[44] Decatur applied for both pensions.[45]

After consulting with the attorney general, the secretary of the navy invited Decatur to choose which pension to receive but found she was not entitled to both. Decatur elected to receive the general pension but later sued to secure the pension provided under the special resolution.[46] The Supreme Court ruled against Decatur, finding that the underlying statutes gave the Navy secretary "discretion" in adjudicating pension claims and administering the pension fund.[47] The Court held it had "no right, by mandamus, to control" the exercise of that discretion.[48]

Decisions about the eligibility of individuals for particular benefits are commonplace in government. A lawful determination not to grant any such individual benefit is not considered an impoundment.

41 CRA History at 11, https://tinyurl.com/ypyt2dbp.
42 Act of July 10, 1832, ch. 194, 4 Stat. 572, https://tinyurl.com/y57dv5pw.
43 *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 513 (1840).
44 Act of Mar. 3, 1837, 6 Stat. 700, https://tinyurl.com/2rpbb5va.
45 *Decatur*, 39 U.S. at 514.
46 *Id.*
47 *Id.* at 515, 517.
48 *Id.*; *see Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925) ("This court held that Congress intended the Secretary to construe the statutes and to allow the pensions accordingly, and that although the court might, as a matter of legal construction, differ from his conclusion, it could not by mandamus or injunction constrain him in his exercise of his discretion.").

James Buchanan

1860

PUBLIC BUILDINGS IN ILLINOIS

UNAUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "President Buchanan withheld funds that had been appropriated to construct public buildings in Illinois in order to punish the State's congressional delegation for opposing the administration's objectives. Although the action was politically unpopular, there does not appear to have been any constitutional objection raised to this impoundment."[49]

ASSESSMENT

This impoundment was **not authorized by statute**, but there is no indication that Buchanan offered any constitutional justification for it.

In 1856 and 1857, Congress appropriated money for the construction of public buildings, including custom and court houses and post offices, in Springfield and Cairo, Illinois.[50] The 1856 appropriation "authorized and directed" the construction of those buildings.[51] The 1857 appropriation provided clearly for their construction.[52] The historical record on what occurred next is sparse. In an 1861 speech on the floor of the Senate, Senator Stephen Douglas of Illinois explained that when President Buchanan "began to quarrel with the Representatives" from Illinois in 1857, he "disobeyed the law" appropriating funding for constructing public buildings.[53] "To this hour," Douglas said, "you could not get the law executed. Other custom-houses could be built; other post offices could be made; but not a dollar could be expended at Springfield or at Cairo in Illinois, although the law required it."[54]

While Douglas did not cite the Constitution in his objection to Buchanan's withholding of funds, he made clear that he believed the law required expenditure of funds to construct the buildings.

49 CRA History at 11, https://tinyurl.com/ypyt2dbp.

50 Act of Aug. 18, 1856, ch. 129, § 18, 11 Stat. 81, 92-93, https://tinyurl.com/5n84b3z8; Act of Mar. 3, 1857, ch. 108, 11 Stat. 221, 226, https://tinyurl.com/3ck7jyxu.

51 Act of Aug. 18, 1856, § 18, 11 Stat. at 92.

52 Act of Mar. 3, 1857, 11 Stat. at 226.

53 Cong. Globe, 36th Cong., 2d Sess. 1177 (1861), https://tinyurl.com/muhe8e6v, *cited by* Louis Fisher, *The Constitution Between Friends: Congress, the President, and the Law* 91 n.36 (1978).

54 Cong. Globe, 36th Cong., 2d Sess., *supra*, at 1177, https://tinyurl.com/muhe8e6v.

Ulysses S. Grant

1876

RIVER AND HARBOR IMPROVEMENTS

UNAUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[a]fter signing the Rivers and Harbors Bill of 1876, President Grant sent a special message to Congress in which he stated that he did not intend to spend the total amount appropriated because certain appropriations were for 'works of purely private or local interest,' and that '[u]nder no circumstances will I allow expenditures upon works not clearly national.' ... Pursuant to the President's order, the Secretary of War refused to spend over half of the $5 million appropriated for internal improvements."[55]

55 CRA History at 11-12, https://tinyurl.com/ypyt2dbp.

ASSESSMENT

This impoundment was **not authorized by statute**, but the administration justified its action on statutory, not constitutional, grounds.

The underlying appropriation stated that "[i]t shall be the duty of the Secretary of War to apply the moneys herein appropriated as far as may be by contract, except when specific estimates cannot be made for particular work, or where, in the judgment of said Secretary, the work cannot be contracted at prices advantageous to the Government ...."[56] Although this allowed, in specified circumstances, for expenditure of less than the full amount appropriated for individual river and harbor improvements, Grant went further and announced that he would not spend any money on "works of purely private or local interest."[57]

The underlying statute did not give the president the authority to do this. It was, for the most part, highly prescriptive, containing several pages of specific amounts to be spent on specific projects.[58]

And yet, when pressed by Congress, the administration defended its action primarily on statutory grounds rather than claiming any constitutional right to impound. In a letter that Grant transmitted to Congress, his secretary of war, J.D. Cameron, explained that "the law and authority" for the administration's action "are found in the act itself, which appropriates certain sums to be expended for certain purposes, under the direction of the Secretary of War, but is in no way mandatory upon him to expend the full amount."[59] Cameron also suggested that the administration had heightened discretion to determine what river and harbor funds would be spent and when because "these appropriations are of the character of 'indefinite appropriations;' i.e., they do not lapse into the Treasury if unexpended at the end of two years."[60] However, given Grant's statement that he would "[u]nder no circumstances" allow the expenditures, it does not appear that he intended merely to defer the spending.[61]

56 Act of Aug. 14, 1876, ch. 267, 19 Stat. 132, 138, https://tinyurl.com/5n9ata7s.

57 Special Message from President Ulysses S. Grant to the House of Representatives (Aug. 14, 1876), https://tinyurl.com/yc7n6sc4.

58 Act of Aug. 14, 1876, 19 Stat. at 132-38, https://tinyurl.com/5n9ata7s.

59 Letter from Secretary of War J.D. Cameron to President Grant (Jan. 11, 1877), *in Executive Documents of the House of Representatives*, 44th Cong., 2d Sess., Exec. Doc. No. 23, at 2 (1877), https://tinyurl.com/5dfuawdk.

60 *Id.*

61 *See* Special Message from President Ulysses S. Grant to the House of Representatives, *supra*, https://tinyurl.com/yc7n6sc4.

Woodrow Wilson

1916

INTERNATIONAL PEACE CONFERENCE

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "President Wilson declined to expend funds appropriated by Congress for holding a peace conference with the great powers aiming to end the First World War."[62]

ASSESSMENT

It is not clear that Wilson impounded these funds.[63] However, to the extent that he did, his action was **authorized by statute**.

In 1916, Congress "authorized and requested" the president "to invite, at an appropriate time, not later than the close of the war in Europe, all the great Governments of the world to send representatives to a conference which will be charged with formulating a plan for a court of arbitration or other tribunal, to which disputed questions between nations shall be referred for adjudication and peaceful settlement."[64] For this purpose, Congress "appropriated and set aside and placed at the disposal of the President" $200,000, "or so much thereof as may be necessary."[65] This language gave the president discretion to determine whether to host the conference, which Congress merely "requested," and how much of the $200,000 to spend, if any.

62 CRA History at 13, https://tinyurl.com/bdf9x8u4 (citing Christian Bale, Note, *Checking the Purse: The President's Limited Impoundment Power*, 70 Duke L.J. 606, 654 (2020), https://tinyurl.com/3yph84v3).

63 The only source CRA cites for this alleged impoundment is a student law review article, which in turn cites only the 1916 appropriation. CRA History at 13, https://tinyurl.com/bdf9x8u4; Bale, *supra*, at 654 & n.276, https://tinyurl.com/3yph84v3. Therefore, it is not clear where the allegation that Wilson refused to spend the appropriation originated (it seems entirely possible that the funds could have supported the costs of the Paris Peace Conference, where the League of Nations was founded).

64 Pub. L. No. 64-241, ch. 417, 39 Stat. 556, 618 (1916), https://tinyurl.com/mr2hrdzv.

65 *Id.*

Warren G. Harding

1921

HOLDING APPROPRIATED FUNDS IN RESERVE TO EFFECT SAVINGS

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[i]n 1921, the first Director of the Budget Bureau (later the Office of Management & Budget), Charles G. Dawes, issued a circular to the Executive Branch expressly reaffirming that appropriations are to be treated as a ceiling on expenditures and not a directive to spend the full amount. Executive officers were to abide by the President's determination of the maximum amount of an appropriation to be expended during the fiscal year, with the rest being placed in a general reserve .... This understanding was repeated by President Harding himself, who instructed his officers that 'you should not only carefully guard against any of your activities being carried on at a rate which would require additional appropriations for the fiscal year, but should arrange to conduct your business with a minimum of expense consistent with efficient administration.' Indeed, the President expressly instructed his officers to impound funds 'to effect some savings from your appropriations for the coming fiscal year.'"[66]

66 CRA History at 13, https://tinyurl.com/bdf9x8u4.

ASSESSMENT

This practice of holding funds in reserve to effect savings was, at the time, **permitted by statute** — provided that agencies could still accomplish applicable statutory objectives. However, CRA's description of this matter is both incomplete and misleading.

Budget Bureau Director Dawes made clear that agency efforts to save money by spending less than the full amount appropriated were never to come at the expense of "the accomplishment of the objects of legislation."[67] Agencies, in other words, could spend less only if they could fully and faithfully execute the laws Congress passed for less money than Congress gave them. For Dawes, the laws Congress passed, not the president's wishes, were of prevailing importance. "Much as we love the President," Dawes explained, "if Congress, in its omnipotence over appropriations and in accordance with its authority over policy, passed a law that garbage should be put on the White House steps, it would be our regrettable duty, as a bureau, in an impartial, nonpolitical and nonpartisan way to advise the Executive and Congress as to how the largest amount of garbage could be spread in the most expeditious and economical manner."[68]

It was through the newly created Bureau of the Budget that Dawes sought to find such economies. At the start of President Harding's term, Congress passed the Budget and Accounting Act of 1921,[69] which established the Bureau and tasked it with helping the president prepare an annual budget request to Congress.[70] To this end, the law gave the Bureau the "authority to assemble, correlate, revise, reduce, or increase the [appropriations] estimates" of executive departments and agencies.[71] In short, it focused the Bureau on proposing savings through an annual budget request to Congress.

The first regulations the Bureau issued in July 1921 established a process for acquiring estimates of appropriations for the president's budget. But those regulations also went a step further.[72] They directed agencies to identify the portion of each appropriation that is "indispensable" in executing the relevant statutory objective and "the resulting balance which may be saved under each appropriation."[73] Agencies then had to submit that information to the president "for his approval," and the amount "approved by the President for expenditure" under an appropriation was to be "considered as the maximum available for obligation during the fiscal year."[74] The remaining funds were kept in a "general reserve," and thus were blocked from expenditure.[75]

It appears that Dawes believed such reserves were permissible, or at least not prohibited by law, provided that agencies accomplished Congress's substantive statutory objectives.

67 *See* Charles Dawes, *The First Year of the Budget of the United States* 118 (1923), https://tinyurl.com/436k8ykh.
68 *Id.* at 178, https://tinyurl.com/ykdnjth5.
69 Budget & Accounting Act of 1921, ch. 18, 42 Stat. 20, https://tinyurl.com/256jcw94.
70 *Id.* § 207, 42 Stat. at 22.
71 *Id.*
72 Budget Circular No. 4 (July 1, 1921), *in* Dawes, *supra*, at 411, https://tinyurl.com/5cfxs6d7.
73 *Id.*
74 *Id.*
75 *Id.*

To establish these reserves, agencies relied on the apportionment process created in the Antideficiency Act.[76] The Antideficiency Act prohibited expenditure of "any sum in excess of appropriations made by Congress," and required the executive branch to "apportion[]" appropriations "by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations."[77] In 1906, the statute said nothing about whether or when agencies could establish reserves against appropriations. In 1950, in response to President Roosevelt's use of reserves during World War II to gut entire projects that Congress funded,[78] lawmakers amended the Antideficiency Act to delineate the exclusive circumstances in which reserves could be established, and in doing so narrowed the executive's discretion.[79]

76 *Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 182 (1971) ("1971 Hearings"), https://tinyurl.com/yrxxd2bn (testimony of Prof. Joseph Cooper) (noting Dawes "alter[ed] the manner in which the provisions of the Anti-Deficiency Act were interpreted and implemented," asserting that "the procedures of apportionment or allotment should be used to make provision for 'savings' as well as for preventing deficiencies"); Memorandum from the Budget Bureau to the Senate Appropriations Committee Concerning the Authority of the Budget Bureau to Set Up Reserves Against Appropriations, in *First Supplemental National Defense Appropriation Bill for 1944: Hearings on H.R. 3598 Before a Subcomm. of the Comm. on Appropriations of the U.S. Senate*, 78th Cong. 738-40 (1943), https://tinyurl.com/ex8y7td9 (citing letter from President Roosevelt to Senator Russell noting that "compliance with the Anti-Deficiency Act" is the purpose of the Bureau's practice of holding appropriated funds in reserve); *First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 336 (testimony of Budget Bureau Director Harold Smith) ("[A]s a practical matter in making apportionments, you must set up some reserves. When you appropriate to a department a particular sum of money, and then say there shall be no deficiency, it is necessary that you apportion that money so that you have some reserve on hand in order that you do not incur a deficiency, because it is practically impossible for a department, or any individual, for that matter, to come out at the end of the year right on the nose, in dollars and cents, with the appropriation.").

77 *See* Pub. L. No. 59-28, ch. 510, § 3, 34 Stat. 27, 48-49 (1906), https://tinyurl.com/yc7p93w4.

78 *E.g.* 1971 Hearings at 392-93, https://tinyurl.com/3ab6h5e9 (study by Prof. J.D. Williams).

79 Pub. L. No. 81-759, ch. 896, § 1211, 64 Stat. 595, 765-66 (1950), https://tinyurl.com/mvx8x3xa.

Herbert Hoover

1931

TEN PERCENT CUT IN GOVERNMENT EXPENDITURES

UNKNOWN

ALLEGED IMPOUNDMENT

According to CRA, "President Hoover vigorously employed the impoundment power to decrease government spending in the midst of the Great Depression. To this end, he ordered administrations to slow down domestic program implementation, which achieved a ten percent cut in government expenditures."[80]

ASSESSMENT

There is **not enough information** to assess this alleged impoundment. The literature cited by CRA leads back to a single source: political scientist Joseph Cooper's 1971 testimony to the Senate on executive impoundment of appropriated funds.[81] Cooper testified that "in 1931 President Hoover used the procedures for establishing an annual budget reserve to effect an overall 10% cut in expenditures. Letters were sent out by the Bureau of the Budget directing the departments to cut their proposed expenditures for fiscal 1932 by 10% and to set up this amount in a reserve which could

80 CRA History at 13-14, https://tinyurl.com/bdf9x8u4.

81 *Id.* at 13-14 & n.88, https://tinyurl.com/bdf9x8u4 (citing the following note); Note, *Impoundment of Funds*, 86 Harv. L. Rev. 1505, 1510-11 & n.21 (1973) (citing Cooper's testimony, 1971 Hearings at 182, https://tinyurl.com/yrxxd2bn); Bale, *supra*, at 654 & n.278, https://tinyurl.com/3yph84v3 (citing the prior Note); *see* 1971 Hearings at 181-89, https://tinyurl.com/yc7y8z5u (testimony of Prof. Cooper).

not be used without approval of the President."[82] Cooper cites no authority in support of this claim, and does not suggest that Hoover either asserted or acted based on a belief in any inherent presidential power to impound. Furthermore, Cooper provides no further detail about what expenditures were ultimately cut or whether the cuts were authorized by statute.

82 1971 Hearings at 182, https://tinyurl.com/yrxxd2bn.

Franklin D. Roosevelt

1933

VARIOUS PROGRAMS

UNKNOWN

ALLEGED IMPOUNDMENT

According to CRA, "[t]hroughout the 1930s, President Roosevelt impounded appropriated funds for various programs, citing economic emergency."[83]

ASSESSMENT

There is **not enough information** to assess this alleged impoundment. CRA relies on a single source to support its claim: a law review article by Nile Stanton.[84] But Stanton spends only a single sentence on this topic — one in which he asserts that "President Roosevelt impounded funds in the 1930s in order to cope with the emergencies of economic depression and war."[85] Stanton, in turn, cites just one source to support that sentence: a study by Professor J.D. Williams, which examined impoundments undertaken by the Roosevelt administration in the 1940s, not the 1930s.[86] It is difficult, without either a program-specific allegation or more detail in the underlying sources, to assess CRA's claim. But in the following example, we assess a specific allegation that the Roosevelt administration impounded funds for Reserve Officers' Training Corps units in 1938.

83 CRA History at 14, https://tinyurl.com/vkjwhfs6.
84 *Id.* at 14 n.90; Nile Stanton, History and Practice of Executive Impoundment of Appropriated Funds, 53 Neb. L. Rev. 1, 10 (1974), https://tinyurl.com/35fxph4v.
85 Stanton, *supra*, at 10 & n.56.
86 *See* J.D. Williams, The Impounding of Funds by the Bureau of the Budget (1955) (Inter-University Case Program, Case Series No. 28), in 1971 Hearings at 378-94, https://tinyurl.com/5vyd9h8b.

Franklin D. Roosevelt

1938

RESERVE OFFICERS' TRAINING CORPS UNITS

UNAUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[i]n 1938, FDR's administration impounded funding for ROTC units."[87]

ASSESSMENT

This impoundment was **not authorized by statute**, but the sources we reviewed gave no indication that the administration offered any constitutional justification for it.

For fiscal year 1937, Congress included in its annual appropriation for the Reserve Officers' Training Corps funds for the establishment of additional

87 CRA History at 14, https://tinyurl.com/vkjwhfs6; *see also* Bale, *supra*, at 636-37, https://tinyurl.com/yvmwt9ry; Elias Huzar, *The Purse and the Sword: Control of the Army by Congress Through Military Appropriations*, 1933-1950, at 363 (1950).

R.O.T.C. units.[88] Though the text of this appropriation neither mentioned nor required the establishment of additional units, the conference committee report shows that Congress included $517,850 for such units.[89] Because there were not enough officers to train the additional units, the administration impounded these funds.[90]

In fiscal year 1938, Congress "reappropriated" the unspent $517,850 for a single fiscal year, but did not mention a specific purpose for which the money should be used.[91] This appears to reflect a disagreement between the Senate and House Appropriations Committees, the former of which sought to reappropriate the $517,850 for "52 additional units" and the latter of which sought to reappropriate it for "general Reserve Officers' Training Corps purposes for the fiscal year 1938."[92] The administration again impounded these funds.[93]

This action was not authorized by statute. Although the law creating the Reserve Officers' Training Corps "authorized" but did not require the president to establish R.O.T.C. units at American colleges and universities,[94] Congress made clear in its single-year reappropriation of the unexpended $517,850[95] that it wanted the Defense Department to spend that money in fiscal year 1938. The department's nonexpenditure of the funds therefore was not authorized by statute.

88 Pub. L. No. 74-598, ch. 404, 49 Stat. 1278, 1301-02 (1936), https://tinyurl.com/mryp2h5y.

89 H.R. Rep. No. 74-2494, at 5 (1936) (Conf. Rep.).

90 H.R. Rep. No. 75-690, at 20 (1937) ("Other units have not been established and will not be established for the advanced reason that there is a lack of officers for detail as instructors."); *Military Establishment Appropriation Bill for 1938: Hearings before the Subcomm. of the H. Comm. on Appropriations*, 75th Cong. 646 (1937), https://tinyurl.com/yvrknw7a (Gen. Conley testified that "[t]o use this $500,000 of which you are speaking — we do not have the officer personnel even to consider establishing additional units. There are plenty of units that want to come in, but we do not have the personnel to handle them."); *Military Establishment Appropriation Bill for 1939: Hearings on H.R. 9995 Before the Subcomm. of the S. Comm. on Appropriations*, 75th Cong. 46 (1938), https://tinyurl.com/mr3d2wp7 (Sen. Russell, noted, with respect to the fiscal year 1937 funds: "Well, those funds were impounded. Something happened to them and not a single unit was established, one of the reasons being that there were not sufficient officers.").

91 Pub. L. No. 75-176, ch. 423, 50 Stat. 442, 465-66 (1937), https://tinyurl.com/yc4wzpsu ("[I]n addition, $517,850 of the appropriation 'Reserve Officers' Training Corps, 1937' ... is hereby reappropriated ....").

92 S. Rep. No. 75-739, at 3 (1937); H.R. Rep. No. 75-690, at 20 (1937).

93 *Military Establishment Appropriation Bill for 1939: Hearings on H.R. 9995*, *supra*, at 46, https://tinyurl.com/mr3d2wp7 (Sen. Russell noted that "[i]n 1938 and 1937 this committee provided an increase in the funds for the R.O.T.C. units sufficient to give every college a unit that wanted one .... Well, those funds were impounded.").

94 National Defense Act Amendments, Pub. L. No. 66-242, ch. 227, § 33, 41 Stat. 759, 776-77 (1920), https://tinyurl.com/ydda9f3d.

95 Pub. L. No. 75-176, 50 Stat. at 465-66, https://tinyurl.com/yc4wzpsu ("[I]n addition, $517,850 of the appropriation 'Reserve Officers' Training Corps, 1937' ... is hereby reappropriated ....").

Franklin D. Roosevelt

1940–43

THREE PUBLIC WORKS PROJECTS

SEE INDIVIDUAL ANALYSIS BELOW

ALLEGED IMPOUNDMENT

According to CRA, "[b]etween 1940 and 1943, President Roosevelt refused to spend more than $500 million in public works funds on policy grounds."[96]

ASSESSMENT

Three impoundments in this category are analyzed individually below. None were authorized by statute.

CRA's allegation that Roosevelt impounded $500 million Congress appropriated for public works projects leads back[97] to a single source: Professor J.D. Williams's study entitled "The Impounding of Funds by the Bureau of the Budget."[98] Williams provides no source for that figure, but highlights specific impoundments of funds Congress appropriated for a levee near Tulsa, Oklahoma ($513,000); a flood control reservoir in Markham Ferry, Oklahoma ($1.5 million); and the construction of two airports in Nevada ($800,000).[99] These impoundments, totaling $2.813 million, are analyzed below. None were authorized by statute.

Before proceeding to that analysis, some context is important. In successive budget messages to Congress, President Roosevelt stated that he would defer, and significantly restrict expenditures on, construction projects that interfered with or were not essential to the war effort.[100] To carry this out, the Bureau of the Budget used the apportionment process established in the Antideficiency Acts of 1905 and 1906[101] to place funds for those projects in reserve, blocking their expenditure.[102]

This practice was a departure from how the Bureau previously used the apportionment process, which was to prevent deficiencies (i.e., expenditure in excess of an appropriation) and to find cost savings where a program could be

96 CRA History, at 14, https://tinyurl.com/vkjwhfs6.

97 *Id.* at 14 (citing Note, *Impoundment of Funds*, 86 Harv. L. Rev., *supra*, at 1509); Note, *Impoundment of Funds*, 86 Harv. L. Rev., *supra*, at 1509 (citing J.D. Williams, *The Impounding of Funds by the Bureau of the Budget, supra*, *in* 1971 Hearings at 378, 390, https://tinyurl.com/5vyd9h8b).

98 1971 Hearings at 390, https://tinyurl.com/4vaxswwa.

99 *Id.* at 381-87, https://tinyurl.com/5y42nhf5.

100 President Franklin Roosevelt, Annual Budget Message to Congress (Jan. 3, 1941), https://tinyurl.com/bpc5m252 ("During this period of national emergency it seems appropriate to defer construction projects that interfere with the defense program by diverting manpower and materials."); President Franklin Roosevelt, Annual Budget Message to Congress (Jan. 5, 1942), https://tinyurl.com/4j3k77df ("The public works program is being fully adjusted to the war effort. The general program of 578 million dollars includes those projects necessary for increasing production of hydroelectric power, for flood control, and for river and harbor work related to military needs. Federal aid for highways will be expended only for construction essential for strategic purposes. Other highway projects will be deferred until the postwar period. For all other Federal construction I am restricting expenditures to those active projects which cannot be discontinued without endangering the structural work now in progress."); President Franklin Roosevelt, Annual Budget Message to Congress (Jan. 6, 1943), https://tinyurl.com/j4dnpf6y ("The most important reductions recommended for the coming year relate to work relief and general public works .... Expenditures for general public works will be greatly curtailed. Continuing projects are directly related to war needs. Others have been discontinued as rapidly as this could be done without risking the loss of the investment already made.").

101 Pub. L. No. 58-217, ch. 1484, § 4, 33 Stat. 1214, 1257-58 (1905), https://tinyurl.com/yc3fmej7; Pub. L. No. 59-28, ch. 510, § 3, 34 Stat. 27, 48-49 (1906), https://tinyurl.com/yc7p93w4.

102 *See* Memorandum from the Budget Bureau to the Senate Appropriations Committee Concerning the Authority of the Budget Bureau to Set Up Reserves Against Appropriations, in *First Supplemental National Defense Appropriation Bill for 1944: Hearings, supra,* at 738-40, https://tinyurl.com/bdf8v6yj; J.D. Williams, *The Impounding of Funds by the Bureau of the Budget*, *supra*, *in* 1971 Hearings at 378-94, https://tinyurl.com/5vyd9h8b.

executed as Congress intended without expending the full amount Congress had appropriated.[103] "The Bureau of the Budget," its first director wrote, "is simply a business organization whose activities are devoted constantly to the consideration of how money appropriated by Congress can be made to go as far as possible toward the accomplishment of the objects of legislation."[104] In other words, while the Bureau strove to save money, doing so was never to come at the expense of faithfully executing the laws Congress enacted.

During World War II, Roosevelt took a different approach, using the apportionment process not merely to find savings but to block an array of enacted projects, such as those listed above. This pattern drew considerable criticism from congressional appropriators, who demanded to know the legal basis for the Bureau's impoundments.[105] "Now, where is the law," Senator John Overton asked in a 1943 hearing, "that authorizes either the Executive or the Bureau of the Budget to impound funds that have been appropriated by Congress?"[106]

In a memorandum to the Senate Appropriations Committee, the Bureau outlined its answer.[107] While it argued that the Antideficiency Act permitted impounding funds to effect savings, the Bureau conceded that no "express enactment" allowed the president to block "projects that have been authorized and appropriated for if he does not consider them of important value to the military."[108] Such actions, the Bureau asserted, "must be viewed … as an exercise by the President (or in his behalf) of the ultimate responsibility and authority vested in him as Chief Executive by article II, section 1, of the Constitution, an authority which includes general administrative control over the officers of the executive departments in the performance of their official duties."[109]

Though the Bureau relied on this argument to justify impoundments during the war, nothing, in the words of one scholar, "could resolve doubts in the minds of some of the officials in the Budget Bureau about its legal authority to impound funds in peacetime when the war power of the President could no longer be relied upon."[110] This doubt prompted the Bureau to go to Congress to seek statutory support for its asserted authority to impound funds via the apportionment process.[111] In a 1950 amendment to the

103 *See* Budget Circular No. 4 (July 1, 1921), *in* Dawes, *supra*, at 411, https://tinyurl.com/5cfxs6d7; 1971 Hearings at 181-83, 379, https://tinyurl.com/yc7y8z5u (noting differences in use of apportionment process during Roosevelt administration compared to prior administrations).

104 Dawes, *supra*, at 118, https://tinyurl.com/436k8ykh.

105 *See, e.g.*, *First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 336-42, https://tinyurl.com/3dmav2uk (remarks by Senators Overton, McKellar, and Thomas); *see also, e.g.*, *Departments of State, Justice, and Commerce Appropriation Bill for 1944*, 78th Cong. 56-61 (1943), https://tinyurl.com/53xnnc32 (remarks by Senators McCarran and White).

106 *First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 336, https://tinyurl.com/3dmav2uk.

107 *See* Memorandum from the Budget Bureau to the Senate Appropriations Committee Concerning the Authority of the Budget Bureau to Set Up Reserves Against Appropriations, in *First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 738-40, https://tinyurl.com/bdf8v6yj.

108 *Id.* at 739-40.

109 *Id.* at 740.

110 1971 Hearings at 392, https://tinyurl.com/3ab6h5e9 (study by Prof. J.D. Williams).

111 *Id.* at 392-93; U.S. Bureau of the Budget & U.S. Gen. Accounting Off., B-66949, Report and Recommendations by the Director of the Bureau of the Budget and the Comptroller General of the United States With Respect to the Antideficiency Act and Related Legislation and Procedures (June 5, 1947), https://tinyurl.com/yhdcwhpk (proposed bill language starting at PDF pages 37-38).

Antideficiency Act, Congress clarified and narrowed the Bureau's authority, allowing it to place funds in reserve only to "provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available."[112] Establishing reserves for other purposes, as Roosevelt did during the war to halt entire projects, was thus officially foreclosed.

112 Pub. L. No. 81-759, ch. 896, § 1211, 64 Stat. at 765-66, https://tinyurl.com/mvx8x3xa.

Franklin D. Roosevelt

1940–43

PUBLIC WORKS PROJECT 1: LEVEE PROJECT

UNAUTHORIZED

ALLEGED IMPOUNDMENT

Public works impoundment #1: Levee project near Tulsa, Oklahoma[113]

ASSESSMENT

This impoundment was **not authorized by statute**. But in response to pressure from Congress and the War Production Board, the Bureau of the Budget released the funds before they expired, allowing the project to move forward.

In the Flood Control Act of 1941, Congress authorized an array of construction projects for "the control of destructive floodwaters," and provided that the projects "shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and the supervision of the Chief of Engineers ...."[114] Among the projects Congress "authorized" was a levee on the Arkansas River "in the immediate vicinity of Tulsa and West Tulsa, Oklahoma."[115] In the Third Supplemental National Defense Appropriation Act of 1942 and the War Department Civil Appropriation Act of 1943, Congress included $300,000 and $213,000, respectively, for that project.[116] The former appropriation was "to remain available until expended"; the latter was an annual appropriation set to expire on June 30, 1943.[117]

In early 1942, the Bureau of the Budget placed those funds in reserve, blocking their expenditure.[118] This action followed a finding by the War

113 1971 Hearings at 381-86, https://tinyurl.com/5y42nhf5; CRA History at 14, https://tinyurl.com/vkjwhfs6 (noting Tulsa levee impoundment); *see also* Stanton, *supra*, at 10, https://tinyurl.com/35fxph4v.

114 Pub. L. No. 77-228, ch. 377, § 3, 55 Stat. 638, 639 (1941), https://tinyurl.com/yj85575s.

115 *Id.*, 55 Stat. at 645-46 ("The project for local flood protection on both sides of the Arkansas River in the immediate vicinity of Tulsa and West Tulsa, Oklahoma ..."); 1971 Hearings at 381 (study by Prof. J.D. Williams), https://tinyurl.com/5y42nhf5.

116 Pub. L. No. 77-353, ch. 591, 55 Stat. 810, 829 (1941), https://tinyurl.com/mu9uayu3; S. Rep. No. 77-894, at 6 (1941) (noting $300,000 for Tulsa and West Tulsa, Oklahoma, under "Flood control, general"); H.R. Rep. No. 77-1501, at 8 (1941) (Conf. Rep.) (noting decision to go with Senate, rather than House, proposal for the flood control appropriation); Pub. L. No. 77-527, ch. 246, 56 Stat. 219, 221-22 (1942), https://tinyurl.com/3vjpkwff; H.R. Rep. No. 77-2041, at 2 (1942) (Conf. Rep.) (noting appropriation of $213,000 for "Tulsa-West Tulsa project, to protect defense industries from floods").

117 Pub. L. No. 77-353, 55 Stat. at 829, https://tinyurl.com/mu9uayu3; Pub. L. No. 77-527, 56 Stat. at 219, 221-22, https://tinyurl.com/3cufkh6n.

118 1971 Hearings at 382-83 (study by Prof. J.D. Williams), https://tinyurl.com/3zz29pm3; *War Department Civil Functions Appropriation Bill, 1944: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 78th Cong. 21-22 (1943), https://tinyurl.com/3jpdabcf; Independent Offices Appropriation Bill for 1945: Hearings Before the Subcomm. of the S. Comm. on Appropriations, 78th Cong. 268-69 (1944), https://tinyurl.com/bdfmj2kt (letter from Budget Bureau to War Department announcing placement of $300,000 for Tulsa levee project into budgetary reserve).

Production Board that the Tulsa project could not "properly be described as essential to the national defense."[119]

Nothing in the 1941 Flood Control Act, the underlying appropriations acts, or the Antideficiency Act permitted the Bureau's impoundment of the entire amount Congress appropriated for the levee project, which Congress had provided "shall be prosecuted."[120] The Bureau of the Budget conceded as much in a memorandum it sent to the Senate Appropriations Committee. This impoundment, the Bureau wrote, "was not taken in pursuance of any express enactment, and must be viewed therefore as an exercise by the President (or in his behalf) of the ultimate responsibility and authority vested in him as Chief Executive by article II, section 1, of the Constitution, an authority which includes general administrative control over the officers of the executive departments in the performance of their duties."[121]

Despite this pronouncement, developments on the Arkansas River and in Congress ultimately forced the Bureau to change course. After the Arkansas River overflowed in June 1942, forcing the closure of a nearby steel mill that handled war contracts, pressure built on the Bureau to release the Tulsa funds.[122] Senator Elmer Thomas, a member of the Senate Appropriations Committee, threatened to introduce an amendment requiring the expenditure of the funds.[123] And days later, the War Production Board both deemed the Tulsa project "necessary for war purposes" and notified Congress of its reversal.[124] In October 1942, the Bureau released the money, allowing the project to move forward.[125]

Although the Bureau released the funds well before they were set to expire, the Bureau's hold on the funds violated the authorizing statute's requirement that the flood control projects "shall be prosecuted as speedily as may be consistent with budgetary requirements."[126] The Bureau did not withhold the money for budgetary reasons. Thus, the delay in expenditure was not permitted under the statute, making it an unauthorized impoundment.

119 1971 Hearings at 383 (study by Prof. J.D. Williams), https://tinyurl.com/3zz29pm3; *see* Independent Offices Appropriation Bill for 1945: Hearings, *supra*, at 268-69, https://tinyurl.com/bdfmj2kt (letter from Budget Director Harold Smith to War Department justifying placement of Tulsa levee funds in budgetary reserve because the project was not "designated as of sufficient importance to the national defense to be constructed at the present time").

120 *See* Pub. L. No. 77-228, 55 Stat. at 639, https://tinyurl.com/yj85575s.

121 Memorandum from the Budget Bureau to the Senate Appropriations Committee Concerning the Authority of the Budget Bureau to Set Up Reserves Against Appropriations, in *First Supplemental National Defense Appropriation Bill for 1944: Hearings, supra,* at 740, https://tinyurl.com/bdf8v6yj.

122 1971 Hearings at 385-86, https://tinyurl.com/yuufc573.

123 *First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 340, https://tinyurl.com/2mdvwzpk; *see* 1971 Hearings at 385-86, https://tinyurl.com/yuufc573.

124 1971 Hearings at 385-86, https://tinyurl.com/yuufc573; Second Supplemental National Defense Appropriation Act, Pub. L. No. 77-763, ch. 629, 56 Stat. 990 (1942), https://tinyurl.com/4uz4s8jp (H.R. 7672).

125 *War Department Civil Functions Appropriation Bill, 1944: Hearings*, *supra*, at 21-22 & n.7, https://tinyurl.com/3jpdabcf (table noting release of impounded Tulsa project funds); 1971 Hearings at 386 (study by Prof. Williams), https://tinyurl.com/yykeeckr; Louis Fisher, *Politics of Impounded Funds*, 15 Admin. Sci. Quarterly 361, 365 (1970), https://www.jstor.org/stable/2391628.

126 Pub. L. No. 77-228, 55 Stat. at 639, https://tinyurl.com/yj85575s.

Franklin D. Roosevelt

1940–43

PUBLIC WORKS PROJECT 2: FLOOD CONTROL RESERVOIR

UNAUTHORIZED

ALLEGED IMPOUNDMENT

Public works impoundment #2: Flood control reservoir in Markham Ferry, Oklahoma[127]

ASSESSMENT

This impoundment was **not authorized by statute**. However, the Roosevelt administration justified its action narrowly on the ground that the project was not essential to the war effort, and ultimately released the impounded funds to pay for other flood control projects in the next fiscal year.

In the Flood Control Act of 1941, Congress authorized an array of construction projects for "the control of destructive floodwaters," and provided that the projects "shall be prosecuted as speedily as may be consistent with budgetary requirements, under the direction of the Secretary of War and the supervision of the Chief of Engineers ...." [128] Among the projects Congress authorized was a flood control reservoir in Markham Ferry, in Oklahoma's Grand River Basin.[129] In the Third Supplemental National Defense Appropriation Act of 1942, Congress included $1.5 million for that project under the "[f]lood control, general" heading.[130] The money was "to remain available until expended."[131]

Despite the Flood Control Act's requirement that the authorized projects "shall be prosecuted,"[132] the Bureau of the Budget impounded the Markham Ferry funds and blocked the construction of that project.[133] This action was not authorized by the Flood Control Act, the underlying appropriation act, or the Antideficiency Act.

Bureau of the Budget Director Harold Smith justified the impoundment on the grounds that the project conflicted with national defense priorities: "The manufacture of hydroturbines (which would be needed were Markham Ferry to be undertaken) is in direct competition with the manufacture of

127 1971 Hearings at 381-83, https://tinyurl.com/5y42nhf5; CRA History at 14, https://tinyurl.com/vkjwhfs6 (noting Markham Ferry impoundment).

128 Pub. L. No. 77-228, § 3, 55 Stat. at 639, https://tinyurl.com/yj85575s.

129 *Id.*, 55 Stat. at 645-46 (Arkansas River Basin projects); *Third Supplemental National Defense Appropriation Bill for 1942: Hearings Before the Subcomm. of the S. Comm. on Appropriations*, 77th Cong. 320 (1941), https://tinyurl.com/5n6evw3s (testimony of Sen. Elmer Thomas) (noting "the Markham Ferry proposed power development is authorized for construction by the provisions of Public Law 228, 77th Congress"); 1971 Hearings at 381-82, https://tinyurl.com/5y42nhf5 (study by Prof. J.D. Williams) ("A $15.4 million power and flood control reservoir at Markham Ferry on the Grand Neosho River in Oklahoma was also authorized by Public Law 228.").

130 Pub. L. No. 77-353, 55 Stat. at 829, https://tinyurl.com/mu9uayu3; S. Rep. No. 77-894, at 6 (1941) (noting $1,500,000 for Markham Ferry, Oklahoma, under "Flood control, general"); H.R. Rep. No. 77-1501, at 8 (Conf. Rep.) (noting decision to go with Senate, rather than House, proposal for the flood control appropriation).

131 Pub. L. No. 77-353, 55 Stat. at 829, https://tinyurl.com/mu9uayu3.

132 Pub. L. No. 77-228, 55 Stat. at 639, https://tinyurl.com/yj85575s.

133 *War Department Civil Functions Appropriation Bill, 1944: Hearings*, *supra*, at 21-22 & n.5, https://tinyurl.com/3jpdabcf (table noting impoundment of Markham Ferry funds and noting their "[r]elease[] at the end of fiscal year 1942 to supplement the regular appropriation for the fiscal year 1943 for application to other projects in the program for that year"); Independent Offices Appropriation Bill for 1945: Hearings, *supra*, at 268-69, https://tinyurl.com/bdfmj2kt (letter from Budget Bureau to War Department announcing placement of "$1,500,000 for construction of the Markham Ferry Reservoir project" into "budgetary reserve").

guns and forgings."[134] Although the Bureau ultimately released the $1.5 million, it was used "to supplement the regular [flood control, general] appropriation for fiscal year 1943 for application to other projects in the program for that year," not to construct the Markham Ferry reservoir.[135]

134 1971 Hearings at 382, https://tinyurl.com/3zz29pm3 (study by Prof. J.D. Williams, quoting Budget Director Smith); *see* Independent Offices Appropriation Bill for 1945: Hearings, *supra*, at 268-69, https://tinyurl.com/bdfmj2kt (letter from Budget Director Smith to War Department announcing placement of Markham Ferry funds in reserve because the project was not "designated as of sufficient importance to the national defense to be constructed at the present time").

135 *War Department Civil Functions Appropriation Bill, 1944: Hearings*, *supra*, at 22 & n.5, https://tinyurl.com/3jpdabcf.

Franklin D. Roosevelt

1940–43

PUBLIC WORKS PROJECT 3: NEVADA AIRPORTS

UNAUTHORIZED

ALLEGED IMPOUNDMENT

Public works impoundment #3: construction of two airports in Nevada[136]

ASSESSMENT

This impoundment was **not authorized by statute**, but the administration justified it narrowly on the need to pursue only those construction projects that were necessary to the war effort and the airports ultimately were built.

In 1942, Congress passed an appropriations act providing that "not to exceed" $800,000 "shall be available for the establishment of landing areas" until June 30, 1943.[137] Although neither the statute nor the accompanying committee reports specified where these airport landing areas were to be built,[138] the Bureau of the Budget acknowledged in testimony before Congress that it understood the provision to refer to the proposed construction of airports in Lovelock and Winnemucca, Nevada.[139] The Bureau nevertheless placed those funds in reserve and refused to release them even after receiving requests to do so from the Commerce Department in 1942 and 1943.[140] In its responses denying those requests, the Bureau of the Budget stressed that, in order to release the funds, it needed to receive certifications that construction of the airports was "necessary for the prosecution of the war."[141] When the Commerce Department turned to the Army for that certification, the Army denied it, finding that "[a]t the present time no military necessity has developed that requires construction or

136 1971 Hearings at 386-87, https://tinyurl.com/yykeeckr.

137 Pub. L. No. 77-644, ch. 472, 56 Stat. 468, 492 (1942), https://tinyurl.com/ycxkw76d.

138 *Id.*; H.R. Rep. No. 77-1771 (1942); S. Rep. No. 77-1347 (1942); H.R. Rep. No. 77-2236, at 7 (1942) (Conf. Rep.) (adding proviso making "not to exceed $800,000" available "for the establishment of landing areas").

139 Departments of State, Justice, and Commerce Appropriation Bill for 1944: Preliminary Hearings Before the Subcomm. of the S. Comm. on Appropriations, 78th Cong. 57 (1943), https://tinyurl.com/ycxd8k6v (testimony of L.C. Martin, Assistant Dir. in Charge of Estimates, Bureau of the Budget) ("We understood you had in mind the two projects in Nevada.").

140 *Id.* at 50 (testimony of Administrator of Civil Aeronautics Charles Stanton); *id.* at 50-51 (excerpt from the Budget Bureau's letter denying Stanton's "requested release of $298,606 for the construction of an airport at Winnemucca, Nev."); Independent Offices Appropriation Bill for 1945: Hearings, *supra*, at 268, https://tinyurl.com/bdfmj2kt (letter from Budget Bureau to Commerce Department denying the latter's request for the release of $304,755 for construction of the Lovelock airport).

141 Departments of State, Justice, and Commerce Appropriation Bill for 1944: Preliminary Hearings, *supra*, at 50-51, https://tinyurl.com/3myaf454 (Bureau of the Budget letter regarding Winnemucca); Independent Offices Appropriation Bill for 1945: Hearings, *supra*, at 268 (Bureau of the Budget letter regarding Lovelock).

use of critical materials at either of these locations."[142] Thus, close to six months after Congress appropriated funds for the airports, they remained impounded.

This action was not authorized by statute. Although that law gave the administration discretion in determining the exact amount to spend on the airports — "not to exceed $800,000" — it explicitly provided that some amount beneath that cap "shall be available for the establishment of landing areas."[143] In testimony before Congress, the Budget Bureau conceded that "there is no authority in law specifically authorizing the Bureau of the Budget to place in a budget reserve any part of an appropriation made available to any department or agency of the Government."[144]

Thus, although congressional testimony from 1949 confirms that the airports ultimately were built,[145] there was no statute authorizing the Bureau's impoundment.

142 Departments of State, Justice, and Commerce Appropriation Bill for 1944: Preliminary Hearings, *supra*, at 51, https://tinyurl.com/yz9f4e5f (response from Col. James Newman, chief of the Army Air Forces's Buildings and Grounds Division of Office of Space Service, to Administrator of Civil Aeronautics Charles Stanton).

143 Pub. L. No. 77-644, 56 Stat. at 492, https://tinyurl.com/ycxkw76d.

144 Departments of State, Justice, and Commerce Appropriation Bill for 1944: Preliminary Hearings, *supra*, at 56, https://tinyurl.com/53xnnc32 (testimony of Budget Bureau's L.C. Martin).

145 Departments of State, Justice, Commerce, and Judiciary Appropriation Bill for 1950: Hearings Before the Subcomm. of the S. Comm. on Appropriations, 81st Cong. 347-48 (1949), https://tinyurl.com/3xp239uv (remarks of Sen. McCarran) (referencing airports at Lovelock and Winnemucca, Nevada).

Franklin D. Roosevelt

1941

CIVILIAN CONSERVATION CORPS

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[i]n the early 1940s, the administration 'ordered impoundment of ... $95 million which had been appropriated for the Civilian Conservation Corps' surplus labor force ....'"[146]

ASSESSMENT

This impoundment was **authorized by statute**. In 1941, Congress appropriated a total of $246,960,000 for the Civilian Conservation Corps.[147] Due to declining enrollment in the Corps,[148] Congress inserted a provision in the appropriation providing that: "In the expenditure of funds appropriated herein under the heading 'Civilian Conservation Corps,' the over-all cost per enrollee per year shall not exceed $1,000 on the basis of a total enrollee appropriated strength herein of two hundred and thirty-two thousand five hundred enrollees: Provided, That irrespective of the total number of enrollees either authorized or actually enrolled, in no event shall there be expended more than $1,000 per actual enrollee per year."[149]

146 CRA History at 14, https://tinyurl.com/vkjwhfs6 (quoting Stanton, *supra*, at 10, https://tinyurl.com/2skcky9c).

147 Pub. L. No. 77-146, ch. 269, 55 Stat. 466, 472-73 (1941), https://tinyurl.com/2c6ebf8x.

148 H.R. Rep. No. 77-688, at 17-19 (1941) (describing enrollment challenges and provision to limit costs per enrollee to $950); S. Rep. No. 77-441, at 4 (1941) (describing provision to limit costs per enrollee to $1,060); H.R. Rep. No. 77-881, at 4 (1941) (Conf. Rep.) (resolving difference between House and Senate proposals and setting provision to limit costs per enrollee at $1,000).

149 Pub. L. No. 77-146, 55 Stat. at 473, https://tinyurl.com/2c6ebf8x.

Following this statutory guidance and in accordance with a Corps enrollment of roughly 148,000 youths, the Bureau of the Budget placed $95,000,000 in reserve and made approximately $150,000,000 available to the Corps to spend.[150] Because Congress provided that "in no event shall there be expended more than $1,000 per actual enrollee per year," this impoundment was authorized by statute.

150 *Reduction of Nonessential Federal Expenditures: Hearings Before the Joint Comm. on Reduction of Nonessential Federal Expenditures*, 77th Cong. 1-2, 138 (1941), https://tinyurl.com/47mab7ed (testimony of B.S. Beecher, Bureau of the Budget).

Franklin D. Roosevelt

1942

FUNDS FOR THE DEPARTMENT OF AGRICULTURE

UNAUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[i]n the early 1940s," the Roosevelt administration impounded funds appropriated for "the Surplus Marketing Corporation."[151]

ASSESSMENT

Though there was no Surplus Marketing Corporation, it appears that this is a reference to funds originally appropriated for the Surplus Marketing Administration, the impoundment of which was **not authorized by statute**. Nevertheless, the administration defended its action on statutory, not constitutional, grounds.

In February 1942, President Roosevelt consolidated the Surplus Marketing Administration, the Agricultural Marketing Service, and the Commodity Exchange Administration into the Agricultural Marketing Administration in the Department of Agriculture.[152] In January 1943, the Bureau of the Budget testified that it had placed $38,520,919 appropriated for the Agricultural Marketing Administration in reserve.[153] The Bureau did not specify from which appropriation or appropriations the money placed in reserve came. But Senator Richard Russell wrote to the president "criticizing [t]he Budget Bureau's attempt to curtail ... the food distribution programs of the Agricultural Marketing Administration."[154]

This seems most likely to be a reference to a $35 million appropriation for the Surplus Marketing Administration for fiscal years 1942 and 1943, provided to "procure, transport, and distribute agricultural and other commodities and supplies to meet the emergent requirements of the civilian population of the Territories and possessions of the United States ...."[155] This spending appears to be mandatory under the language of the appropriation — which provides a particular sum to be spent within a specific timeframe on the listed statutory objectives, without any discretionary language.[156] The impoundment of this appropriation therefore was not authorized.

151 CRA History at 14, https://tinyurl.com/vkjwhfs6.
152 Exec. Order No. 9069 (Feb. 23, 1949), https://tinyurl.com/2hyj2c82.
153 *Reduction of Nonessential Federal Expenditures: Hearings Before the Joint Comm. on the Reduction of Nonessential Federal Expenditures, Part 5*, 78th Cong. 1821 (1943), https://tinyurl.com/4ydcr9v2.
154 J.D. Williams, *The Impounding of Funds by the Bureau of the Budget, supra*, *in* 1971 Hearings at 385, https://tinyurl.com/yuufc573.
155 Pub. L. No. 77-371, ch. 621, 55 Stat. 855, 855-56 (1941), https://tinyurl.com/3b5nk45a (appropriation for).
156 *Id.*

However, President Roosevelt sent a reply to Senator Russell's letter defending the Budget Bureau's practice of placing funds in reserve, and arguing that it was justified based on the need to comply with the Antideficiency Act and to achieve savings where possible.[157]

157 Memorandum from the Budget Bureau to the Senate Appropriations Committee Concerning the Authority of the Budget Bureau to Set Up Reserves Against Appropriations, *in First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 739, https://tinyurl.com/ex8y7td9 (excerpting Roosevelt's letter to Sen. Russell); *Departments of State, Justice, and Commerce Appropriation Bill for 1944: Preliminary Hearings*, *supra*, at 57, https://tinyurl.com/836jy2s (excerpting Roosevelt's letter to Russell).

Franklin D. Roosevelt

1942

CIVILIAN PILOT TRAINING PROGRAM

UNAUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[i]n the early 1940s," the Roosevelt administration impounded funds for "civilian pilot training projects."[158]

ASSESSMENT

This impoundment was **not authorized by statute**, but the Bureau of the Budget ultimately released more than half of the impounded funds.

In 1939, Congress passed the Civilian Pilot Training Act, which authorized the Civil Aeronautics Authority — later the Civil Aeronautics Administration — to train civilian pilots "within the limits of available appropriations made by the Congress."[159] In 1941, Congress appropriated $25 million for "[a]ll necessary expenses" in carrying out that program.[160] In 1942, the Bureau of the Budget froze $1.13 million of that appropriation.[161] As the administrator for civil aeronautics, Brigadier General D.H. Connolly, confirmed in testimony before Congress, this withholding forced the Civil Aeronautics Administration to "discontinue some primary training over the country."[162]

Nothing in the text of the 1939 Civilian Pilot Training Act or the 1941 appropriation permitted this impoundment.[163] Although the Bureau of the Budget argued during the Roosevelt administration that the Antideficiency Act gave it the authority to hold appropriated funds in reserve to effect savings,[164] nothing in that law provided authority to effect savings where doing so would harm the execution of the programs that Congress had funded. Because the Bureau's 1942 impoundment of civilian pilot training funds forced the curtailment of that training program, the Antideficiency Act could not have provided statutory support for the withholding.

158 CRA History at 14, https://tinyurl.com/vkjwhfs6.

159 Pub. L. No. 75-153, ch. 244, § 2, 53 Stat. 855, 855-56 (1939), https://tinyurl.com/yauhsx3h.

160 Pub. L. No. 77-135, ch. 258, 55 Stat. 265, 280 (1941), https://tinyurl.com/yjz48kvb.

161 *Department of Commerce Appropriation Bill for 1943: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 77th Cong. 121-23 (1942), https://tinyurl.com/mrxksmn9; *see Department of State Appropriation Bill for 1943: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 77th Cong. 490 (1942), https://tinyurl.com/5yzc4knt (statement of Rep. Rabaut) ("And over and above that, the Budget froze some of the money this year.").

162 *Department of Commerce Appropriation Bill for 1943: Hearings*, *supra*, at 123, https://tinyurl.com/2a5z5nsu.

163 *See generally* Pub. L. No. 75-153, 53 Stat. at 855-56, https://tinyurl.com/yauhsx3h; Pub. L. No. 77-135, 55 Stat. at 280, https://tinyurl.com/yjz48kvb.

164 *See* Memorandum from the Budget Bureau to the Senate Appropriations Committee Concerning the Authority of the Budget Bureau to Set Up Reserves Against Appropriations, *in First Supplemental National Defense Appropriation Bill for 1944: Hearings*, *supra*, at 738-40, https://tinyurl.com/ex8y7td9.

Nonetheless, it appears the Bureau of the Budget ultimately released some of the $1.13 million it impounded, as the administration reported in a subsequent budget request to Congress that only $511,372 of the $25 million Congress appropriated for civilian pilot training for fiscal year 1942 remained unobligated.[165]

165 U.S. Bureau of the Budget, Exec. Off. of the President, Budget of the United States for 1944 — War Supplement, at 74-75 (1943), https://tinyurl.com/5xuszr8s (listing actual obligations for civilian pilot training for fiscal year 1942).

Harry S. Truman

1946

KINGS RIVER PROJECT

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, President Harry Truman "temporarily impounded funds appropriated to develop water resources as part of the Kings River Project in order to study the prospective costs of the project."[166]

ASSESSMENT

This impoundment was **expressly authorized by statute**. Congress explicitly forbade the president from spending this appropriation until the proper study had been completed. The appropriation act provided that "none of the appropriation for the Kings River and Tulare Lake project, California, shall be used for the construction of the dam until the Secretary of War has received the reports as to the division of costs between flood control, navigation, and other water uses ...."[167] President Truman acknowledged that he was following Congress's express instructions when he temporarily withheld expenditures until reports from the various agencies arrived and were analyzed: "[I]n view of the legislative history of the provisos in the Kings River item, and in view of the disadvantageous position in which the Government would be placed if repayment arrangements were unduly postponed, I am asking the Director of the Budget to impound the funds appropriated for construction of the project, pending determination of the allocation of costs and the making of the necessary repayment arrangements."[168]

In January 1947, the secretary of war notified Truman that the required reports on the allocation of costs for the project were complete.[169] After Truman submitted the reports to Congress in February 1947,[170] he released the funds for the Kings River project — long before they were set to expire in June 1947.[171]

166 CRA History at 15, https://tinyurl.com/36y8m9s8.

167 Pub. L. No. 79-374, ch. 247, 60 Stat. 160, 163 (1946), https://tinyurl.com/yc8949pd. The authorizing law also explicitly emphasized the secretary of war's discretion in completing the project, noting that it was "authorized substantially in accordance with the plans contained in House Document Numbered 630, ... *with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable* ...." Pub. L. No. 78-534, ch. 665, 58 Stat. 887, 901 (1944), https://tinyurl.com/266eeekr (emphasis added).

168 Statement by the President Concerning Plans for Development of California's Water Resources (May 3, 1946), https://tinyurl.com/ymr3txyr.

169 H. Doc. No. 80-136, Report on Allocation of Costs of King River and Tulare Lake Project, California, at 1-2 (Jan. 31, 1947).

170 *See id.* at 1.

171 Fisher, *Presidential Spending Power*, *supra*, at 166; Pub. L. No. 79-374, 60 Stat. at 160, 163, https://tinyurl.com/yc8949pd.

Harry S. Truman

1946

NATIONAL GUARD

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, President Truman impounded half of the $110 million Congress appropriated for the National Guard in 1946.[172]

ASSESSMENT

This impoundment was ultimately **authorized by statute**. In late 1946 or early 1947, the Budget Bureau placed $60 million of the National Guard's $110 million appropriation in reserve pending Congress's consideration of a bill to transfer a substantial portion of that appropriation to the "Finance Service, Army" appropriation account.[173] In May 1947, Congress passed a law authorizing the transfer of up to $55.1 million from the National Guard appropriation to the Army's Finance Service.[174] Ultimately, $48.2 million was transferred.[175]

As Major General Kenneth Cramer, then the chief of the National Guard Bureau, told the House Appropriations Committee: "the initiation of the [transfer] action was executive in character" but "it was subsequently ratified by Congress."[176]

172 CRA History at 15, https://tinyurl.com/36y8m9s8 (citing Bale, *supra*, at 655, https://tinyurl.com/4ad-swd7v); Pub. L. No. 79-515, ch. 583, 60 Stat. 541, 556 (1946), https://tinyurl.com/yh9xt9hf.

173 *Military Establishment Appropriation Bill for 1948: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 80th Cong. 1109-10 (1947), https://tinyurl.com/4y8949uh.

174 Pub. L. No. 80-44, ch. 49, 61 Stat. 57, 71 (1947), https://tinyurl.com/28w2t2xs.

175 *Military Functions, National Military Establishment Appropriation Bill for 1949: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 80th Cong. 427 (Mar. 29, 1948), https://tinyurl.com/375j-dctu; *but see id.* at 264 (noting a transfer not of $48.225 million but of $49.625 million).

176 *Id.* at 419.

Harry S. Truman

1949

TEN ADDITIONAL AIR FORCE GROUPS

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, this impoundment contains "[t]he most notable examination of the constitutional issue."[177]

In 1949, after an intense debate between Congress and the Department of Defense over the appropriate size of the Air Force, Congress appropriated funds to support 58 Air Force groups over the White House's requested 48.[178] President Truman announced he was placing the funds for those additional groups in reserve.[179]

ASSESSMENT

This impoundment was **authorized by statute**, but the Truman administration justified it on constitutional grounds.

177 CRA at 15, https://tinyurl.com/36y8m9s8.

178 H.R. Rep. No. 81-417, at 30-36 (1949) (House report on National Military Establishment Appropriation Act, 1950); S. Rep. No. 81-745, at 31-32 (1949) (Senate report on the same); H.R. Rep. No. 81-1454, at 2 (1949) (Conf. Rep.) (noting compromises between House and Senate proposals).

179 Presidential Statement on Signing the National Military Establishment Appropriation Act, 1950 (Oct. 29, 1949), *in* 1971 Hearings at 524-25, https://tinyurl.com/537v7y3r; Letter from President Truman to Defense Secretary Louis Johnson (Nov. 8, 1949), *in* 1971 Hearings at 525, https://tinyurl.com/bd9ra8en; *see National Military Establishment Appropriation Bill for 1950: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 81st Cong. 227-44 (1949), https://tinyurl.com/yu5w78v6 (Mar. 31, 1949, Air Force testimony); Fisher, *Presidential Spending Power*, *supra*, at 162-63.

In the 1950 National Military Establishment Appropriation Act, Congress appropriated funds for the Air Force, above the administration's request, to support an expansion of the Air Force from 48 to 58 groups.[180] However, the enacted legislation gave the administration discretion not to spend the additional funds. This was the result of a compromise between the House, which sought the additional funds and supported the expansion to 58 groups, and the Senate, which opposed the funds and the expansion.

In its draft 1950 National Military Establishment Appropriation bill, the House added funds for additional Air Force groups to seven appropriations: (1) construction of aircraft and related procurement; (2) special procurement; (3) maintenance and operations; (4) military personnel requirements; (5) research and development; (6) salaries and expenses, administration; and (7) contingencies.[181] The Senate opposed each of these increases.[182]

In conference, the managers for the House and Senate arrived at a compromise. The final bill would include the higher amounts the House proposed for five appropriations — construction of aircraft and related procurement ("an amount not to exceed $1,992,755,000" for contracts), special procurement ($134,477,000), maintenance and operations ($1,199,792,000), research and development ($233,000,000, "to remain available until expended"), and contingencies ($15,200,000, "[f]or emergencies and extraordinary expenses, … to be expended on the authority or approval of the Secretary of the Air Force") — and the lower amounts the Senate proposed for two appropriations, military personnel requirements ($1,201,000,000) and salaries and expenses, administration ($58,425,000).[183] However, because the Senate continued to oppose the House-urged funding increases, the final bill also included a provision — section 702 — reducing the amount the Air Force actually could spend on special procurement and maintenance and operations. Section 702 provided that "amounts

180 Pub. L. No. 81-434, ch. 787, 63 Stat. 987, 1013-17 (1949), https://tinyurl.com/c3tt3tnt; S. Rep. No. 81-745, at 31-32 (1949) (table reflecting differences between administration, House, and Senate proposals for Air Force appropriations); H.R. Rep. No. 81-417, *supra*, at 30-36 (noting increases above administration request for the purpose of "increasing the proposed strength to 58 groups").

181 H.R. Rep. No. 81-417, *supra*, at 30-36; *see* S. Rep. No. 81-745, *supra*, at 31-32 (table comparing House, Senate, and administration proposals).

182 S. Rep. No. 81-745, *supra*, at 31-32 (table showing lower Senate proposals for construction of aircraft and related procurement, special procurement, maintenance and operations, military personnel requirements, research and development, salaries and expenses, and contingencies); *id.* at 20 (responding to the House and recommending "reduc[ing] the proposed air-group strength from 58 to 48 groups).

183 H.R. Rep. No. 81-1454, supra, at 2 (Conf. Rep.); Pub. L. No. 81-434, 63 Stat. at 1013-17, https://tinyurl.com/c3tt3tnt (enacted appropriations reflecting House-proposed levels for construction of aircraft and related procurement, special procurement, maintenance and operations, research and development, and contingencies, and Senate-proposed levels for military personnel requirements and salaries and expenses, administration). CRA claims that the Senate agreed to the higher amounts that the House sought for additional Air Force groups "on the express understanding that the President retained inherent impoundment power." CRA History at 15-16, https://tinyurl.com/4kambfft. Nothing in the legislative history or other historical records suggests the Senate held this view, let alone provides an express statement of it. The secondary source CRA cites for its claim does not mention the Constitution. Rather, it quotes Sen. Elmer Thomas, who said of the funds provided for the additional Air Force groups that he thought they "should be impounded" and that "if the money is appropriated it may not be used." *See* Fisher, *Presidential Spending Power*, *supra*, at 162-63; 95 Cong. Rec. S14355 (daily ed. Oct. 12, 1949), https://tinyurl.com/ythvbf49 (statement of Sen. Thomas). Thomas did not specify a legal basis for a potential impoundment of those funds. But given the discretion that Congress wrote into the appropriations it ultimately enacted, Thomas's remarks cannot, without more, be read as support for a constitutional impoundment power.

to be obligated or expended" under those headings "shall not exceed" $125,797,000 and $1,143,858,000, respectively.[184]

In October 1949, Truman signed the 1950 National Military Establishment Appropriation Act into law and announced that he was "directing the Secretary of Defense to place in reserve the amounts provided by the Congress ... for increasing the structure of the Air Force."[185] These reserves appear to have consisted of the contract authority the House had included for "construction of aircraft and related procurement." Truman held $726,151,000 of that amount in reserve "as a result of [his] determination not to expand the Air Force above the 48-group level."[186] Because the 1950 National Military Establishment Appropriation Act "authorized" — but did not require — contracts "in an amount not to exceed $1,992,755,000,"[187] this impoundment was permitted by statute.

The Air Force also reported nonexpenditures under the other appropriations the House sought to increase to fund the additional Air Force groups.[188] These unobligated amounts included:

- $3,500,000 for special procurement;[189]
- $1,800,000 for maintenance and operations;[190]
- $31,320,538 for research and development;[191] and
- $1,592,528 for contingencies.[192]

Each of these nonexpenditures was permitted by statute.

- Section 702 of the 1950 National Military Establishment Appropriation Act provided that "amounts to be obligated or expended" for special procurement and maintenance and operations "shall not exceed" $125,797,000 and $1,143,858,000, respectively.[193] This allowed for the respective nonexpenditures of $3,500,000 and $1,800,000.

184 Pub. L. No. 81-434, § 702, 63 Stat. at 1024-25, https://tinyurl.com/muewtnf9; H.R. Rep. No. 81-454, *supra*, at 2 (Conf. Rep.) (noting "Amendment No. 100 reduces certain specific appropriations"); 95 Cong. Rec. S14353-55 (daily ed. Oct. 12, 1949), https://tinyurl.com/bdfpa22a (Senate debate over conference committee amendments).

185 Presidential Statement on Signing the National Military Establishment Appropriation Act, 1950, *in* 1971 Hearings at 524-25, https://tinyurl.com/537v7y3r.

186 U.S. Bureau of the Budget, Exec. Off. of the President, *Budget of the United States Government for Fiscal Year 1951*, at 745 (1950), https://tinyurl.com/r5ereuzz.

187 Pub. L. No. 81-434, 63 Stat. at 1013, https://tinyurl.com/c3tt3tnt.

188 There is no evidence that these unobligated amounts were held in reserve, blocking their expenditure.

189 U.S. Bureau of the Budget, Exec. Off. of the President, *Budget for the Military Functions of the Department of Defense for the Fiscal Year 1952*, at 126 (1951), https://tinyurl.com/fm9sx3ha ($3,500,000 is the account's "[u]nobligated balance, estimated savings (available for administrative reappropriation in subsequent year).").

190 *Id.* at 119-20 ($1,800,000 is the account's "[u]nobligated balance, estimated savings (available for administrative reappropriation in subsequent year).").

191 *Id.* at 123 ($31,320,538 is the account's "[b]alance available in subsequent year" after subtracting, from the total unobligated balance of $36,320,538, the $5,000,000 transfer the account received. This transfer was subtracted from the total unobligated balance to isolate the likely amount of the original 1950 research and development appropriation that remained unobligated at the end of the fiscal year.).

192 *Id.* at 126 ($1,592,528 is the "[u]nobligated balance, estimated savings (available for administrative reappropriation in subsequent year)" after subtracting, from the total unobligated balance of $1,595,508, the $2,980 transfer the account received. This transfer was subtracted from the total unobligated balance to isolate the likely amount of the original 1950 contingencies appropriation that remained unobligated at the end of the fiscal year.).

193 Pub. L. No. 81-434, § 702, 63 Stat. at 1024-25, https://tinyurl.com/muewtnf9.

- The appropriation for research and development provided that $233,000,000 was "to remain available until expended."[194] This permitted the delayed expenditure of $31,320,538, as Congress did not require the full amount of that appropriation to be spent in fiscal year 1950.
- Finally, the contingencies appropriation provided $15,200,000 for "emergencies and extraordinary expenses, ... to be expended on the authority or approval of the Secretary of the Air Force, and such expenses may be accounted for solely on his certificate ...."[195] This requirement of approval and control by the secretary, and the clear intention of the funds for "emergencies and extraordinary expenses," gave the Air Force discretion to spend less than the full amount appropriated.

Although these impoundments were, for those reasons, authorized by statute, the Truman administration defended them on constitutional grounds on two occasions. In testimony before the House Appropriations Committee, Defense Secretary Louis Johnson asserted that "the power" to impound the additional Air Force funds "is vested in the President as Commander in Chief."[196] And later in 1950, when a reporter asked President Truman why he did not spend the money appropriated for the additional Air Force groups, he responded: "It wasn't necessary. It was not necessary .... That is the discretionary power of the President. If he doesn't feel like the money should be spent, I don't think he can be forced to spend it."[197]

194 *Id.* at 1015.
195 *Id.* at 1017.
196 *Department of Defense Appropriations for 1951: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 81st Cong. 54-55 (1950), https://tinyurl.com/4wc5ns5j (exchange between Rep. Mahon and Defense Secretary Johnson).
197 President's News Conference of Sept. 28, 1950, 1 Pub. Papers 661 (1950), https://tinyurl.com/3fm99yu2.

Harry S. Truman

1949

U.S.S. UNITED STATES AIRCRAFT CARRIER

NOT AN IMPOUNDMENT

ALLEGED IMPOUNDMENT

In 1949, Truman's secretary of defense canceled the construction of a Navy aircraft carrier, the *U.S.S. United States*, at the urging of the Joint Chiefs of Staff and with the approval of the chairs of the House and Senate Armed Services Committees and the president.[198] CRA claims that Truman impounded funds Congress appropriated for the *U.S.S. United States*.[199]

198 Fisher, *Politics of Impounded Funds*, *supra*, at 367-68; *Military Situation in the Far East: Hearings before the S. Comm. on Armed Services & the S. Comm. on Foreign Relations*, 82d Cong. 2636-37 (1951), https://tinyurl.com/6js5aas2 (testimony of Defense Secretary Johnson); *National Military Establishment Bill for 1950: Hearings Before a Subcomm. of the S. Comm. on Appropriations*, 81st Cong. 161 (1949), https://tinyurl.com/383swetf (letter from Defense Secretary Johnson canceling *U.S.S. United States*).
199 CRA History at 15, https://tinyurl.com/36y8m9s8 (citing Stanton, *supra*, at 12, https://tinyurl.com/3kj57dbd (alleging Truman impounded funds for *U.S.S. United States*)). Citing Stanton, CRA claims Truman impounded funds for the *U.S.S. Forrestal*, as well. *Id.* Stanton relies on a single authority in alleging this: the 1973 Senate testimony of Comptroller General Elmer Staats. Stanton, *supra*, at 12 & n.73. Staats claimed that "[i]n 1950, the aircraft carrier *Forrestal* was canceled by the DOD after funds had been appropriated." *Impoundment of Appropriated Funds by the President: Joint Hearings Before the Ad Hoc Subcomm. of the S. Comm. on Government Operations & the Subcomm. on the Separation of Powers of the S. Comm. on the Judiciary*, 93d Cong. 98 (1973) ("1973 Hearings"), https://tinyurl.com/56jhskc9. However, Staats was mistaken; he appears to have confused the *Forrestal*, which was not canceled, with the *United States*, which was canceled. The *Forrestal* was commissioned as the Navy's first "supercarrier" in 1955, and it served tours in the Mediterranean and Pacific. *See* Nat'l Museum of U.S. Navy, *USS Forrestal (CVA-59, later CV-59, and AVT-59)*, https://tinyurl.com/yk2juwey (last visited Mar. 9, 2025). Because Stanton and CRA present

ASSESSMENT

Truman **did not impound funds** for the *U.S.S. United States*. In 1948, Congress appropriated funds for the "new postwar shipbuilding program"[200] under the headings "[c]onstruction of ships" and "[o]rdnance for new construction."[201] These appropriations were "to remain available until expended."[202] Although neither enacted appropriation directly named or referenced the *U.S.S. United States*, the Senate committee report accompanying the 1949 Department of the Navy Appropriation Act mentioned that Congress included funds "for beginning work on the new 65,000-ton superaircraft carrier" — a reference to the *United States* — "as well as [for] conversions to other types of vessels ...."[203] Neither the Senate nor the House committee reports specified a particular amount they wanted to be spent on the carrier.[204]

In 1948 and early 1949, the Navy began constructing the carrier, laying its keel on April 18, 1949.[205] On April 23, Defense Secretary Johnson sent a letter to the secretary of the navy announcing his decision to cancel further construction of the carrier.[206] Johnson later testified that he did so at the urging of the Joint Chiefs, and after consulting with and securing the approval of the chairs of the House and Senate Armed Services Committee.[207]

Because no law required the construction of the carrier or the expenditure of a particular sum on it, and because we found no evidence that money intended for the carrier was withheld, it appears that Defense Secretary Johnson did not, in canceling the carrier, impound funds intended for it. Evincing its approval of the cancellation, Congress did not appropriate further funds for the *U.S.S. United States*. Rather, as a Senate Appropriations Committee noted in a report, the 1950 "[c]onstruction of ships" and "[o]rdnance for new construction" appropriations were "intended to permit the Navy to undertake a substitute shipbuilding program to replace the item approved in the 1949 appropriation bill for the Navy for the consideration of a flush-deck carrier."[208]

---

no evidence that funds appropriated for the *Forrestal* were impounded, or even that its construction was impeded, this appendix addresses only the alleged impoundment of funds effected as a result of the cancellation of the *U.S.S. United States*.

200 S. Rep. No. 80-2136, at 14-15 (1948) (Senate report accompanying Department of the Navy Appropriation Bill, 1949); H.R. Rep. No. 80-1621, at 5 (1948) (House report accompanying the same).

201 Pub. L. No. 80-753, ch. 617, 62 Stat. 584, 592 (1948), https://tinyurl.com/yhauxu6k.

202 *Id.*

203 S. Rep. No. 80-2136, *supra*, at 15.

204 *Id.* at 14-15; H.R. Rep. No. 80-1621, *supra*, at 4-6.

205 Walter Waggoner, *Keel Is Laid for Super-Carrier, Issue in Navy-Air Force Dispute*, N.Y. Times (Apr. 19, 1949), https://tinyurl.com/hvxutne8.

206 *National Military Establishment Bill for 1950: Hearings*, *supra*, at 161, https://tinyurl.com/383swetf (letter from Defense Secretary Johnson).

207 *Military Situation in the Far East: Hearings*, *supra*, at 2637, https://tinyurl.com/6js5aas2.

208 S. Rep. No. 81-745, at 10 (1949).

Harry S. Truman

1950

CONSTRUCTION OF VETERANS' HOSPITALS

AUTHORIZED

ALLEGED IMPOUNDMENT

In 1949, President Truman temporarily withheld funds allocated to build new veterans' hospitals after World War II to allow the Veterans Administration to determine where to best locate the new hospitals."[209] CRA refers to this as a "high profile impoundment."[210]

ASSESSMENT

This impoundment was **expressly authorized by statute**. In 1931, Congress authorized the construction of new Veterans Administration hospitals and facilities and provided that such construction "shall be done in such manner as the President may determine," and that the "location and nature" of the new buildings "shall be in the discretion of the Administrator of Veterans' Affairs, subject to the approval of the President."[211] This authorizing law gave the president ultimate authority to control future veterans' hospital construction.

During Truman's presidency, appropriations acts providing funding for veterans' hospital construction were governed by and explicitly referenced the 1931 authorizing law, giving Truman the authority to determine whether and how to spend the hospital construction funds.[212] Several of these appropriations acts contained additional permissive language authorizing obligations "not exceeding" a particular amount, subject to "the approval of the President."[213]

Years later, a former administrator of veterans' affairs who testified to Congress agreed that Truman's action was an example of an impoundment authorized by statute (though in his view, this statute was the Antideficiency Act).[214]

209 1971 Hearings at 84-85, https://tinyurl.com/bdfrrczf (testimony of William Driver, former administrator of veterans' affairs); Fisher, *Presidential Spending Power*, *supra*, at 151.

210 CRA at 15, https://tinyurl.com/36y8m9s8.

211 Pub. L. No. 71-868, ch. 521, 46 Stat. 1550-51 (1931), https://tinyurl.com/4242b436.

212 Pub. L. No. 79-49, ch. 106, 59 Stat. 106, 129 (1945), https://tinyurl.com/mptnmu52; Pub. L. No. 79-334, ch. 113, 60 Stat. 60, 77 (1946), https://tinyurl.com/yhbwvhjf; Pub. L. No. 79-419, ch. 425, 60 Stat. 262, 265 (1946), https://tinyurl.com/5b364vu7; Pub. L. No. 80-269, ch. 359, 61 Stat. 585, 605-06 (1947), https://tinyurl.com/393w5735; Pub. L. No. 80-862, ch. 775, 62 Stat. 1196, 1201 (1948), https://tinyurl.com/jymmphb4; Pub. L. No. 81-266, ch. 506, 63 Stat. 631, 654-55 (1949), https://tinyurl.com/4nwytp5y; Pub. L. No. 81-759, ch. 896, 64 Stat. at 719, https://tinyurl.com/mwnpzhtd.

213 Pub. L. No. 80-269, 61 Stat. at 605-06, https://tinyurl.com/393w5735; Pub. L. No. 80-862, 62 Stat. at 1201, https://tinyurl.com/jymmphb4.

214 1971 Hearings at 84-85, https://tinyurl.com/bdfrrczf.

Harry S. Truman

1950

DOMESTIC PROGRAMS DURING THE KOREAN WAR

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, Truman impounded appropriations for numerous "domestic programs in order to focus on the Korean War effort."[215]

ASSESSMENT

This impoundment was **expressly authorized by statute**. Section 1214 of the 1950 Omnibus Appropriations Act directed the president to "reduce[] in the amount of not less than $550,000,000" appropriations, reappropriations, and contract authorizations provided for in that act.[216] In a 1973 congressional hearing, both then Senator Hubert Humphrey and Comptroller General Elmer Staats cited this episode as an example of Congress authorizing the president to impound funds, in contrast to Nixon's impoundments contrary to statute.[217]

215 CRA History at 15, https://tinyurl.com/36y8m9s8.
216 Pub. L. No. 81-759, § 1214, 64 Stat. at 595, 768, https://tinyurl.com/4kwt5vtu.
217 1973 Hearings at 67-68, 99, https://tinyurl.com/4apuh2a7.

Dwight D. Eisenhower

1956

INCREASE IN MARINE CORPS PERSONNEL

UNAUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, in 1956, President Dwight Eisenhower "impounded $46.4 million appropriated by Congress to increase Marine Corps personnel."[218]

ASSESSMENT

This impoundment was **not authorized by statute**, but the administration did not justify it on constitutional grounds.

In 1955, Congress appropriated $650,244,000 for "Military Personnel, Marine Corps" for fiscal year 1956; $290,190,000 for "Marine Corps Procurement," which was "to remain available until expended"; and $181,605,000 for "Marine Corps Troops and Facilities" for fiscal year 1956.[219] These enacted amounts included $33.8 million above the administration's request for Marine Corps military personnel, $8.9 million above the administration's request for Marine Corps troops and facilities, and $3.7 million above the administration's request for Marine Corps procurement.[220] Congress apparently provided this additional $46.4 million to support an "[i]ncrease in Marine Corps strength."[221] Although the enacted appropriations did not specify a particular number of Marine Corps personnel, it is relatively clear from the increase in funds for "Military Personnel" and "Marine Corps Troops and Facilities," and that the funds were available for only a single fiscal year (1956), that Congress intended to effect some increase in the

218 CRA History at 16, https://tinyurl.com/4kambfft; *see also* Stanton, *supra*, at 12 & n.74, https://tinyurl.com/3vsde2uw; 1971 Hearings at 471, 526, https://tinyurl.com/2kv4sd3n.
219 Pub. L. No. 84-157, ch. 358, 69 Stat. 301, 307 (1955), https://tinyurl.com/3hkbnwe5.
220 1971 Hearings at 471, https://tinyurl.com/2kv4sd3n (table entitled "Department of Defense Analysis of Planned Utilization of Additional Appropriations Provided by the Congress over Budget Request, Fiscal Year 1956").
221 *Id.*

size of the Marine Corps during fiscal year 1956. But the Corps appears not to have spent any of the additional funds.[222]

Despite this, the administration in no way suggested that it had any constitutional right to withhold these funds. Rather, a military official suggested that the Marine Corps had simply applied the funds as it had done in previous years, and that the Corps had fewer personnel than previously estimated. In a 1956 hearing before the House Appropriations Committee, Marine Corps Fiscal Director Maj. Gen. David Shoup explained that the annual Marine Corps military personnel appropriation "estimate is a mathematical application of rates of pay and allowances prescribed by law to be paid or furnished under varied conditions and situations .... The [fiscal year] 1956 estimate upon which the appropriation was based provided for an end strength of 215,000," but the actual end strength amounted to 201,000.[223] "The unobligated amount," Shoup continued, "is due principally to a lower personnel plan."[224]

222 *Id.*

223 *Department of the Navy Appropriations for 1957: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 84th Cong. 103 (1956), https://tinyurl.com/526r39ep (testimony of Maj. Gen. Shoup).

224 *Id.*

Dwight D. Eisenhower

1957

DEFENSE CUTBACKS

? UNKNOWN

ALLEGED IMPOUNDMENT

According to CRA, "[i]n 1957, [Eisenhower] 'issued a series of orders and announcements for cutbacks and stretchouts in defense programs.' In 1958, he 'asked agency heads to delay and reduce expenditures to avoid the possibility of having to borrow money.'"[225]

ASSESSMENT

There is **not enough information** to assess these alleged impoundments. CRA appears to refer to actions the Eisenhower administration took in late 1957 and early 1958 to delay or temporarily reduce expenditures to avoid breaching the statutory debt limit.[226] However, it is not clear from CRA's paper; the secondary sources it cites;[227] a recent Congressional Research Service report on the debt limit, which references the episode;[228] House and Senate committee reports accompanying the 1958 law raising the debt limit;[229] or congressional testimony on this subject from senior administration

225 CRA History at 16-17, https://tinyurl.com/4kambfft.

226 *See* Pub. L. No. 84-678, ch. 536, 70 Stat. 519, 519 (1956), https://tinyurl.com/cf4mwthe (law enacted July 9, 1956, raising the debt limit until June 30, 1957); Pub. L. No. 85-336, 72 Stat. 27, 27 (1958), https://tinyurl.com/ycswc587 (law enacted Feb. 26, 1958, raising the debt limit until June 30, 1959).

227 Fisher, Presidential Spending Power, *supra*, at 153 ("In 1957, in order to keep within the statutory debt limit, the Eisenhower Administration issued a series of orders and announcements for cutbacks and stretchouts in defense programs. When Congress later raised the debt limit, the money was released."); Stanton, *supra*, at 13 n.79, https://tinyurl.com/32c9canj (citing no supporting authority in a passing reference to actions the Eisenhower administration took to avoid breaching the statutory debt limit).

228 D. Andrew Austin, Cong. Rsch. Serv., R48209, A Binding Debt Limit: Background and Possible Consequences 33 (2024), https://tinyurl.com/msu6sy3d ("During another debt limit episode in 1957, Eisenhower ordered the Pentagon to limit its outlays enough to avoid breaching the debt limit.").

229 H.R. Rep. No. 85-1282 (1958); S. Rep. No. 85-1297 (1958).

officials in 1958 and 1959[230] what specific actions the administration took and which programs were affected.

The only information that is clear from these sources is high level: the administration delayed or temporarily reduced some expenditures, including at the Pentagon, to avoid breaching the statutory debt limit[231] and released those funds when Congress raised the debt limit in early 1958.[232] However, whether the referenced actions were authorized by statute or undertaken in defiance of it is impossible to determine without a clear accounting of what specific actions took place and when.

230 Debt Limit of the United States: Hearing on H.R. 9955 and H.R. 9956, Bills to Provide for a Temporary Increase in the Debt Limit of the United States, Before the H. Comm. on Ways & Means, 85th Cong. (1958) ("House 1958 Debt Limit Hearing"), https://tinyurl.com/48ws2hu7; Debt Ceiling Increase: Hearings on H.R. 995, an Act to Provide for a Temporary Increase in the Public Debt, Before the S. Comm. on Finance, 85th Cong. (1958) ("Senate 1958 Debt Limit Hearings"), https://tinyurl.com/mr2wtzwt; The Budget for 1960: Hearings Before the H. Comm. on Appropriations, 86th Cong. 40 (1959), https://tinyurl.com/ytrrrpx3 (testimony of Budget Bureau Director Maurice Stans) ("In any event, the process of slowing up the rate of expenditure at that time was, to the best of my knowledge, one of holding within the debt limit and when Congress returned and the debt limit was increased the money was released.").

231 *See* House 1958 Debt Limit Hearing at 23, https://tinyurl.com/32chps7x (testimony of Treasury Secretary Robert Anderson acknowledging, in response to a question about whether "cutbacks in the defense program over the last 6 months" were due to the "close proximity of the national debt to the ceiling during that period," that "in the calculations of the expenditure rates of each of the Government agencies there has been and will continue to be some judgments taken in light of the debt ceilings"); Senate 1958 Debt Limit Hearings at 23-24, https://tinyurl.com/3da88wfh (testimony of Secretary Anderson acknowledging a "decrease by some 5 or 6 percent the amount of progress payments on certain of the [Defense Department] contracts"); *id.* at 45 (Secretary Anderson noting that he "call[ed] the attention, not only of the Department of Defense but of all the other departments of Government, that we were very close to the debt ceiling, and that" perhaps "our expenditure programs [should] not move forward so rapidly as to exhaust our balances"); Austin, Cong. Rsch. Serv., *supra*, at 33, https://tinyurl.com/msu6sy3d (noting limits on Pentagon outlays).

232 The Budget for 1960: Hearings, *supra*, at 40, https://tinyurl.com/ytrrrpx3 (testimony of Budget Bureau Director Stans that "when Congress returned and the debt limit was increased the money was released"); Fisher, Presidential Spending Power, *supra*, at 153 (noting release of funds after debt limit increase); Pub. L. No. 85-336, 72 Stat. at 27, https://tinyurl.com/ycswc587 (raising the debt limit on Feb. 26, 1958).

Dwight D. Eisenhower

1959

HOUND DOG MISSILE PROGRAM

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[i]n 1959, [Eisenhower] impounded $48 million in Hound-dog missile funds ...."[233]

ASSESSMENT

This impoundment was **authorized by statute** and did not impair the Air Force's continued development of the Hound Dog missile.

In 1958, Congress included funding for the Hound Dog missile program in an appropriation entitled "Aircraft, Missiles and Related Procurement,"[234] which provided a lump sum of over $6.6 billion to the Department of the Air Force.[235] The enacted appropriations language made no mention of any particular aircraft or missile program, instead providing the Air Force with discretion to allocate the appropriated funds among the listed purposes, which included "construction, procurement, and modification of aircraft,

233 CRA History at 17, https://tinyurl.com/3a2hzh3a; *see also* Stanton, *supra*, at 12 & n.74, https://tinyurl.com/3vsde2uw; 1971 Hearings at 474, 526, https://tinyurl.com/ukj5prvz.

234 H.R. Rep. No. 85-1830, at 62, 65-66 (1958); S. Rep. No. 85-1937, at 13 (1958) ("In amounts related to House action, the committee has approved the House additions for MINUTEMAN and HOUND DOG programs."); *see* H.R. Rep. No. 85-2503, at 7 (1958) (Conf. Rep.) (noting final amount appropriated for Air Force aircraft, missiles, and related procurement).

235 Pub. L. No. 85-724, 72 Stat. 710, 720 (1958), https://tinyurl.com/4u6tmee6.

missiles, and equipment."[236] Moreover, the language specified that the $6.6 billion appropriation was to "remain available until expended,"[237] meaning that the Air Force did not have to spend the full amount of the appropriation in that single fiscal year.

Although Congress noted in committee reports that it included $48 million above the administration's request for the Hound Dog,[238] Air Force Secretary James Douglas testified in a 1959 hearing that these additional funds "were not apportioned" — meaning that the Air Force did not spend them.[239] Because of the discretion granted in the text of the Air Force's "Aircraft, Missiles and Related Procurement" appropriation, and the absence of a requirement to spend a particular sum on the Hound Dog, the Air Force was not required to spend the additional $48 million Congress had included. But the Air Force did continue work on the program. Indeed, as President Eisenhower noted in a 1959 budget message to Congress, "the production of the Hound Dog air-to-ground missile has been accelerated."[240]

236 *Id.*
237 *Id.*
238 H.R. Rep. No. 85-1830, *supra*, at 9, 62, 65-66; S. Rep. No. 85-1937, *supra*, at 13 ("In amounts related to House action, the committee has approved the House additions for MINUTEMAN and HOUND DOG programs.").
239 *Department of Defense Appropriations for 1960, Part 1: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 86th Cong. 814 (1959).
240 President Dwight Eisenhower, Annual Budget Message to the Congress: Fiscal Year 1960 (Jan. 19, 1959), https://tinyurl.com/paanc23w.

Dwight D. Eisenhower

1959

MINUTEMAN MISSILE PROGRAM

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[i]n 1959, [Eisenhower] impounded … $90 million in Minuteman funds …."[241]

ASSESSMENT

This impoundment was **authorized by statute**. In 1958, Congress included funding for the Minuteman intercontinental ballistic missile program in Air Force appropriations entitled "Aircraft, Missiles and Related Procurement" and "Research and Development."[242] The former appropriation provided $6.6 billion, "to remain available until expended," for "construction, procurement, and modification of aircraft, missiles, and equipment."[243] The latter appropriation provided $743 million, "to remain available until expended," for "expenses necessary for basic and applied scientific research and development."[244] Neither appropriation made specific mention of the Minuteman, instead providing the Air Force with discretion to allocate the funds among the purposes listed in each appropriation.[245] However, House and Senate Appropriations Committee reports show that

241 CRA History at 17, https://tinyurl.com/3a2hzh3a; *see also* Stanton, *supra*, at 12 & n.74, https://tinyurl.com/3vsde2uw; 1971 Hearings at 474, 526, https://tinyurl.com/ukj5prvz.
242 Pub. L. No. 85-724, 72 Stat. at 720-21, https://tinyurl.com/4u6tmee6; H.R. Rep. No. 85-1830, *supra*, at 65-66, 68; S. Rep. No. 85-1937, *supra*, at 13-14 (noting Senate agreement to House proposals for MINUTEMAN funding); *see* 1971 Hearings at 474, https://tinyurl.com/ukj5prvz.
243 Pub. L. No. 85-724, 72 Stat. at 720-21.
244 *Id.*
245 *Id.*

the committees included $75 million above the administration's request for the Minuteman in the "Aircraft, Missiles and Related Procurement" appropriation and $15 million above the administration's request for the Minuteman in the "Research and Development" appropriation.[246]

In a 1959 hearing, Air Force Secretary Douglas testified that while the Bureau of the Budget did not apportion the additional $90 million to the Air Force, the Air Force was able to "more than accomplish" the goal of accelerating the Minuteman program by reprogramming funds for it.[247] As the Defense Department confirmed even more explicitly in subsequent testimony to Congress: "Funds to carry on the MINUTEMAN in fiscal year 1959 on the expanded scale proposed by the Congress were provided by the Air Force through reprogramming funds no longer required for other projects."[248]

Although the Air Force did not spend the specific $90 million Congress included for the Minuteman in its "Aircraft, Missiles and Related Procurement" and "Research and Development" appropriations in fiscal year 1959, Air Force Secretary Douglas confirmed that these funds would be "applied against the 1960 budget."[249] The text of these appropriations gave the Air Force the discretion to do this. Because both appropriations were "to remain available until expended," the Air Force was not required to spend the full amount appropriated in a single fiscal year. And because neither appropriation mentioned, let alone required, the expenditure of a particular sum on the Minuteman, the Air Force ultimately had discretion in the amount it chose to spend on that project, among the other projects funded by the indefinitely available "Aircraft, Missiles and Related Procurement" and "Research and Development" appropriations.

246 H.R. Rep. No. 85-1830, *supra*, at 65-66, 68; S. Rep. No. 85-1937, *supra*, at 13-14 (noting Senate agreement to House proposals for MINUTEMAN funding); *see Department of Defense Appropriations for 1960, Part 1: Hearings*, *supra*, at 32; 1971 Hearings at 474, https://tinyurl.com/ukj5prvz.

247 Department of Defense Appropriations for 1960, Part 1: Hearings, *supra*, at 812-13.

248 1971 Hearings at 474, https://tinyurl.com/ukj5prvz (table of defense appropriations and expenditures).

249 Department of Defense Appropriations for 1960, Part 1: Hearings, *supra*, at 813.

Dwight D. Eisenhower

1959

KC-135 JET TANKERS

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[i]n 1959, [Eisenhower] impounded … $55.6 million for KC-135 tankers …."[250]

ASSESSMENT

This impoundment was **authorized by statute**. In 1958, Congress included funding for additional KC-135 jet tankers in Air Force appropriations entitled "Aircraft, Missiles and Related Procurement" and "Procurement Other Than Aircraft and Missiles."[251] The former appropriation provided over $6.6 billion, "to remain available until expended," for "construction, procurement, and modification of aircraft, missiles, and equipment."[252] The

250 CRA History at 17, https://tinyurl.com/3a2hzh3a; *see also* Stanton, *supra*, at 12 & n.74, https://tinyurl.com/3vsde2uw; 1971 Hearings at 474, 526, https://tinyurl.com/ukj5prvz.

251 1971 Hearings at 474, https://tinyurl.com/ukj5prvz; Pub. L. No. 85-724, 72 Stat. at 720, https://tinyurl.com/4u6tmee6.

252 Pub. L. No. 85-724, 72 Stat. at 720.

latter appropriation provided over $2.22 billion, "to remain available until expended," for "procurement and modification of equipment (including ground handling equipment for aircraft and missiles, ground guidance and electronic control equipment, and ground electronic and communication equipment)."[253] Neither appropriation made specific mention of the tankers, instead providing the Air Force with discretion to allocate the funds among the purposes that each appropriation listed.[254] However, subsequent Defense Department testimony to Congress indicates that Congress included $51.6 million above the administration's request for KC-135 tankers in the "Aircraft, Missiles and Related Procurement" appropriation and $3.9 million above the administration's request for KC-135 tankers in the "Procurement Other Than Aircraft and Missiles" appropriation.[255]

In a 1959 hearing, Air Force Secretary Douglas testified that the service used none of these additional funds.[256] The text of the enacted "Aircraft, Missiles and Related Procurement" and "Procurement Other Than Aircraft and Missiles" appropriations gave the Air Force the discretion not to spend those additional funds. Neither enacted appropriation mentioned the tankers, let alone required the expenditure of a particular sum on their procurement. And both appropriations were "to remain available until expended," meaning the Air Force was not required to spend the full amount of the appropriation in a single fiscal year.[257]

Moreover, it appears that the administration impounded only the additional funds Congress provided for the tankers. Production of the tankers otherwise continued apace. In fact, in Jan. 1959, President Eisenhower noted, in apparent reference to the KC-135, that the "dispersal program for our strategic bomber force and its supporting tankers is nearing completion."[258]

253 *Id.*
254 *See id.*
255 *Department of Defense Appropriations for 1960, Part 1: Hearings*, *supra*, at 33; 1971 Hearings at 474, https://tinyurl.com/ukj5prvz.
256 *Department of Defense Appropriations for 1960, Part 1: Hearings*, *supra*, at 812-13 (testimony of Secretary Douglas).
257 *See* Pub. L. No. 85-724, 72 Stat. at 720, https://tinyurl.com/4u6tmee6.
258 President Dwight Eisenhower, Annual Budget Message to the Congress: Fiscal Year 1960, *supra*, https://tinyurl.com/paanc23w.

Dwight D. Eisenhower

1959

STRATEGIC AIRLIFT AIRCRAFT

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[i]n 1959, [Eisenhower] impounded … $140 million for strategic airlift aircraft."[259]

ASSESSMENT

This impoundment was **authorized by statute**, and appears to have involved only the temporary "postponement" of spending the $140 million to the following fiscal year.[260] This action was well within the Air Force's discretion,

259 CRA History at 17, https://tinyurl.com/3a2hzh3a; *see also* Stanton, *supra*, at 12 & n.74, https://tinyurl.com/3vsde2uw; 1971 Hearings at 474, 526, https://tinyurl.com/ukj5prvz.
260 Department of Defense Appropriations for 1960, Part 1: Hearings, *supra*, at 813 (testimony of Secretary Douglas).

as the governing appropriations act specified that the funds would remain available until expended.

In 1958, Congress included funding for "strategic airlift aircraft" in Air Force appropriations entitled "Aircraft, Missiles and Related Procurement," and "Procurement Other Than Aircraft and Missiles."[261] The former appropriation provided over $6.6 billion, "to remain available until expended," for "construction, procurement, and modification of aircraft, missiles, and equipment."[262] The latter appropriation provided over $2.22 billion, "to remain available until expended," for "procurement and modification of equipment (including ground handling equipment for aircraft and missiles, ground guidance and electronic control equipment, and ground electronic and communication equipment)."[263] Neither appropriation made specific mention of the strategic airlift aircraft, instead providing the Air Force with discretion to allocate the funds among the purposes listed in each appropriation.[264] However, subsequent Defense Department testimony to Congress indicates that Congress included $136.1 million above the administration's request for strategic airlift aircraft in the "Aircraft, Missiles and Related Procurement" appropriation and $3.9 million above the administration's request for strategic airlift aircraft in the "Procurement Other Than Aircraft and Missiles" appropriation.[265]

In a 1959 hearing, Air Force Secretary Douglas testified that the service planned to "postpone[]" spending the "larger part of the $140 million … to the 1960 from the 1959 buy period."[266] The text of the enacted "Aircraft, Missiles and Related Procurement" and "Procurement Other Than Aircraft and Missiles" appropriations gave the Air Force the discretion to do this. Both appropriations provided that the funds were "to remain available until expended," meaning the Air Force was not required to spend them in full in a single fiscal year.[267]

261 1971 Hearings at 474, https://tinyurl.com/ukj5prvz; Pub. L. No. 85-724, 72 Stat. at 720, https://tinyurl.com/4u6tmee6.

262 72 Stat. at 720.

263 *Id.*

264 *Id.*

265 *Department of Defense Appropriations for 1960, Part 1: Hearings*, *supra*, at 33; 1971 Hearings at 474, https://tinyurl.com/ukj5prvz.

266 *Department of Defense Appropriations for 1960, Part 1: Hearings*, *supra*, at 813 (testimony of Secretary Douglas).

267 *See* Pub. L. No. 85-724, 72 Stat. at 720, https://tinyurl.com/4u6tmee6.

Dwight D. Eisenhower

1960

NIKE-ZEUS ANTIMISSILE SYSTEM

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, Eisenhower "withheld … $137 million for Nike-Zeus anti-missile program funds."[268]

Eisenhower confirmed this in his fiscal year 1961 budget message to Congress, where he noted that until further testing could be conducted, "the $137 million appropriated last year by the Congress for initial production steps for the Nike-Zeus system will not be used."[269]

ASSESSMENT

This impoundment was **authorized by statute**. In 1959, Congress added $137 million to an appropriation entitled "Procurement of Equipment and Missiles, Army."[270] The Defense Department indicated that it would spend the additional money on the Nike-Zeus missile system,[271] but the enacted appropriation did not require it to do so.[272] Indeed, the text of the "Procurement of Equipment and Missiles, Army" appropriation stated that the funds in that category were to "remain available until expended," meaning that the Army was not required to spend the full amount of the appropriation in that fiscal year.[273] For these reasons, the underlying statute gave Eisenhower discretion to withhold the additional funds.

However, in his fiscal year 1961 budget message to Congress, Eisenhower made clear that he withheld the funds not to thwart Congress's will, but because he thought the Nike-Zeus technology "should be carefully tested before production is begun."[274] Eisenhower thus "recommend[ed] sufficient funds in [his fiscal year 1961] budget to provide for the essential phases of such testing."[275] Congress subsequently "agreed to limit the program to research and development,"[276] including funds for the Nike-Zeus system in its fiscal year 1961 defense appropriation bill only under the Army's "Research, Development, Test, and Evaluation" appropriation.[277]

268 CRA History at 17, https://tinyurl.com/3a2hzh3a; *see also* Stanton, *supra*, at 12 & n.74, https://tinyurl.com/3vsde2uw; 1971 Hearings at 477 & n.1, 526, https://tinyurl.com/46svjpjj.

269 President Dwight Eisenhower, Annual Budget Message to the Congress: Fiscal Year 1961 (Jan. 18, 1960), https://tinyurl.com/mryn3j6m.

270 S. Rep. No. 86-476, at 3-5 (1959), https://tinyurl.com/4ce9fd24; H.R. Rep. No. 86-408, at 3, 7, 57-59 (1959); Pub. L. No. 86-166, 73 Stat. 366, 374 (1959), https://tinyurl.com/5h2fywve; *see* Memorandum for the President from the Secretary of Defense Regarding Production and Deployment of the NIKE-X, at 8 (Dec. 10, 1966), https://tinyurl.com/yue3re2e.

271 S. Rep. No. 86-476, *supra*, at 5, https://tinyurl.com/y63jutp3; Memorandum for the President from the Secretary of Defense Regarding Production and Deployment of the NIKE-X, *supra*, at 8, https://tinyurl.com/yue3re2e ("Secretary McElroy agreed to accept $137 million for the acceleration of NIKE-ZEUS.").

272 Pub. L. No. 86-166, 73 Stat. at 374, https://tinyurl.com/5h2fywve.

273 *Id.*

274 President Dwight Eisenhower, Annual Budget Message to the Congress: Fiscal Year 1961, *supra*, https://tinyurl.com/mryn3j6m.

275 *Id.*

276 Memorandum for the President from the Secretary of Defense Regarding Production and Deployment of the NIKE-X, *supra*, at 9, https://tinyurl.com/35fyjne7.

277 H.R. Rep. No. 86-1561, at 63-64 (1960) (House report accompanying H.R. 11998, the 1961 defense appropriation bill) (noting funding for Nike-Zeus under "Research, Development, Test, and Evaluation, Army"); S. Rep. No. 86-1550, at 32 (1960) (Senate report accompanying H.R. 11998) (noting funding for Nike-Zeus under "Research, Development, Test, and Evaluation, Army").

Dwight D. Eisenhower

1960

NUCLEAR-POWERED CARRIER

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, Eisenhower "withheld $35 million for nuclear-powered carrier procurement …."[278]

ASSESSMENT

This impoundment was **authorized by statute**. In 1959, Congress provided $1.3 billion for naval shipbuilding in an appropriation entitled "Shipbuilding and Conversion, Navy."[279] The appropriation's text made no mention of a nuclear-powered carrier,[280] but Defense Department testimony to Congress indicates that Congress included $35 million within that appropriation for "advance procurement for [a] nuclear-powered carrier."[281]

The department ultimately declined to spend that money.[282] But the text of the "Shipbuilding and Conversion" appropriation did not require it to do so. The enacted appropriation did not mention a nuclear-powered carrier, let alone specify an amount for its procurement. Instead, it allowed the president to allocate the appropriated funds among the purposes listed in the statute, which included "construction, acquisition, or conversion of vessels" and "procurement of critical long lead time components and designs for vessels to be constructed or converted in the future."[283] Moreover, the appropriation specified that all of the funds for "Shipbuilding and Conversion" were to "remain available until expended,"[284] meaning that the Navy did not have to spend the full amount of that appropriation in that single fiscal year.

278 CRA History at 17, https://tinyurl.com/3a2hzh3a; 1971 Hearings at 477, 526, https://tinyurl.com/46svjpjj.
279 Pub. L. No. 86-166, 73 Stat. at 374, https://tinyurl.com/5h2fywve.
280 *See id.*
281 1971 Hearings at 477, https://tinyurl.com/46svjpjj.
282 *Id.*
283 Pub. L. No. 86-166, 73 Stat. at 374, https://tinyurl.com/5h2fywve.
284 *Id.*

John F. Kennedy

1961

B-70 STRATEGIC BOMBER

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "President Kennedy similarly impounded significant military funds. In 1961, Congress appropriated $380 million for the B-70 strategic bomber — $180 million more than the White House requested in its budget. Kennedy impounded the additional $180 million because he judged that ICBM technology eliminated the need for the additional bombers. Congressman Vinson, chair of the House Armed Services Committee, was furious and drafted language for the next year's appropriation stating 'that the Secretary of the Air Force, as an official of the executive branch, is directed, ordered, mandated, and required to utilize the full amount of the $491 million authority granted' for the B-70 bomber …. President Kennedy forcefully rebuffed Vinson's attempt to encroach upon his executive power. He argued that the language should be modified from 'directed' to 'authorized' because such language is 'more clearly in line with the spirit of the Constitution.'"[285]

285 CRA History at 17-18, https://tinyurl.com/3a2hzh3a (footnotes omitted).

ASSESSMENT

This impoundment was **authorized by statute**. In 1961, President Kennedy requested that Congress appropriate $220 million for the development of a B-70 (later RS-70) bomber.[286] Congress instead included $400 million for the B-70 in a broader $2,403,260,000 appropriation for "Research, Development, Test, and Evaluation, Air Force."[287] The Defense Department refused to spend the additional $180 million that Congress made available, deeming it unnecessary to advance continued research on and testing of the B-70,[288] but nothing in the statute required it to spend the additional amount.

Although the conference committee's report stated that "$400,000,000 of this [Research, Development, Test, and Evaluation, Air Force] appropriation shall be available for the B-70 program,"[289] the text of the enacted "Research, Development, Test, and Evaluation, Air Force" appropriation did not mention, let alone require, the expenditure of a particular sum on the B-70.[290] Moreover, because the "Research, Development, Test, and Evaluation, Air Force" appropriation was "to remain available until expended,"[291] the amount provided for it did not have to be spent in a single fiscal year. The underlying appropriation statute thus gave the Pentagon discretion not to spend the full amount Congress had appropriated.

CRA makes much of a subsequent exchange between President Kennedy and Representative Carl Vinson, the chair of the House Armed Services Committee, about the B-70.[292] Vinson sought to add language to a 1962 defense authorization bill that would have "directed" the Air Force secretary "to utilize an authorization in an amount not less than $491,000,000 during Fiscal Year 1963 to proceed with production planning and long leadtime procurement for an RS-70 weapon system."[293] Kennedy objected to the use of the word "directed," suggesting instead that "the word 'authorized' would be more suitable to an authorizing bill (which is not an appropriation of funds) and more clearly in line with the spirit of the Constitution."[294]

Although Kennedy raised constitutional objections to Vinson's language — "insist[ing]" in a letter to Vinson "upon the full powers and discretions essential to the faithful execution of my responsibilities as President and Commander in Chief, under article II, sections 2 and 3, of the Constitution"[295] — he also emphasized the importance of a "spirit of comity" between the executive and legislative branches and offered that Defense

286 President John Kennedy, Special Message to the Congress on the Defense Budget (Mar. 28, 1961), https://tinyurl.com/354m8xz9.

287 Pub. L. No. 87-144, 75 Stat. 365, 374 (1961), https://tinyurl.com/5n9abct9; H.R. Rep. No. 87-873, at 7 (1961) (Conf. Rep.) ("The Committee of Conference is in agreement that $400,000,000 of this appropriation shall be available for the B-70 program.").

288 Jack Raymond, *Pentagon Orders 780-Million Cut in Air Programs*, N.Y. Times (Oct. 28, 1961), https://tinyurl.com/6j2utxry.

289 H.R. Rep. No. 87-873, *supra*, at 7.

290 *See* Pub. L. No. 87-144, 75 Stat. at 374, https://tinyurl.com/5n9abct9.

291 *Id.*

292 *See* CRA History at 17-18, https://tinyurl.com/3a2hzh3a.

293 H.R. Rep. No. 87-1406, at 1 (1962).

294 Letter from President Kennedy to Rep. Vinson (Mar. 20, 1962), *in* 1971 Hearings at 526, https://tinyurl.com/2e92bher.

295 1971 Hearings at 526, https://tinyurl.com/2e92bher.

Secretary Robert McNamara was willing to "reexamine the RS-70 program."[296] In other words, Kennedy made clear that he did not seek to thwart Congress's will in pursuing and funding the RS-70.

In the end, lawmakers acceded to Kennedy's request to change the text of the defense authorization bill. As one scholar has written, "Congress ultimately omitted mandatory language from the bill, giving Kennedy no occasion to defy any statutory objective."[297] The final bill merely "authorized" an appropriation of $491 million "for the production planning and long leadtime procurement of an RS-70 weapon system,"[298] but did not direct any action.

296 *Id.*

297 Zachary Price, *The President Has No Constitutional Power of Impoundment*, Yale J. Reg. Online, Notice & Comment (July 18, 2024), https://tinyurl.com/2xyb5s95.

298 Pub. L. No. 87-436, 76 Stat. 55, 55 (1962), https://tinyurl.com/5n98vhu2.

Lyndon Johnson

1965

TWO WATERSHED PROJECTS

SEE INDIVIDUAL ANALYSIS BELOW

ALLEGED IMPOUNDMENT

According to CRA, in 1965, President Lyndon Johnson "impounded funds for watershed projects in order to voice his opposition to the legislative procedures used to appropriate the funds. Congress refused to change its procedures and the funds remained impounded for the remainder of the Johnson Administration."[299]

ASSESSMENT

Two potential impoundments in this category are reviewed below. We marked the first as "unknown" because there was not enough information to determine whether funds were impounded. We marked the second as not an impoundment.

CRA's claim appears to conflate two programs, which Congress authorized and funded separately: (1) water resource development projects overseen by the Army Corps of Engineers[300] and (2) watershed projects overseen by the Department of Agriculture.[301]

In support of its claim, CRA cites Louis Fisher's *Presidential Spending Power*. Fisher, in turn, cites several primary sources,[302] including President Johnson's 1965 statement upon signing Public Law 89-298[303] and Representative G.V. Montgomery's 1969 floor remarks asserting that Johnson impounded funds for small watershed projects governed by Public Law 83-566.[304]

299 CRA History at 18; https://tinyurl.com/35zkwp4z (citing Fisher, Presidential Spending Power, *supra*, at 166).

300 Pub. L. No. 89-298, §§ 201(a), 222, 79 Stat. 1073, 1073, 1089 (1965), https://tinyurl.com/4mp398bn; Pub. L. No. 89-299, 79 Stat. 1096, 1097 (1965), https://tinyurl.com/tbxyw7h5 (appropriation for Army Corps of Engineers to carry out water resource development projects).

301 Watershed Protection & Flood Prevention Act, Pub. L. No. 83-566, 68 Stat. 666 (1954), https://tinyurl.com/2jhuasyv; Pub. L. No. 88-573, 78 Stat. 862, 865-66 (1964), https://tinyurl.com/3jx5fmxz (appropriation for Department of Agriculture's Soil Conservation Service for watershed projects).

302 Fisher, Presidential Spending Power, *supra*, at 166 & n.52 (endnotes on page 308 n.52).

303 Statement by the President Upon Signing the Omnibus Rivers and Harbors Bill, 2 Pub. Papers 1083 (Oct. 26, 1965), https://tinyurl.com/52yrvf4h.

304 115 Cong. Rec. H5923-24 (daily ed. Mar. 11, 1969), https://tinyurl.com/heae9was.

Because these programs are distinct, we assess them individually below. Although Johnson objected to a statutory requirement in Public Law 89-298 that the Public Works Committees approve water resource development projects before the Army could draw funds to prosecute them, it is not clear whether Johnson impounded funds in light of this objection. And it appears that Johnson did not impound funds under the "watershed protection" appropriation for small watershed projects, but rather prudently obligated those funds in accordance with the law.

Lyndon Johnson

1965

WATERSHED PROJECT 1: PUBLIC LAW 89-298

UNKNOWN

ALLEGED IMPOUNDMENT

Potential impoundment #1: Funds for water resource development projects under Public Law 89-298

ASSESSMENT

There is **not enough information** to determine whether funds were impounded as a result of Johnson's objection to a committee approval requirement in Public Law 89-298.

Title II of Public Law 89-298, known as the Flood Control Act of 1965, "authorized" the secretary of the army to construct and maintain certain "water resource development project[s]."[305] However, section 201(a) of the law provided that "[n]o appropriation shall be made to construct, operate, or maintain any [water resource development] project if such project has not been approved by resolutions adopted by the Committees on Public Works of the Senate and House of Representatives, respectively. For the purpose of securing consideration of such approval the Secretary shall transmit to Congress a report of such proposed project, including all relevant data and all costs."[306]

President Johnson objected to this procedure on the basis that it violated the Constitution's separation of powers.[307] But he nevertheless signed the legislation into law because he concluded that the legislation "permits, but does not require, the executive branch to use the objectionable procedure."[308] And he "instructed the Secretary of the Army to refrain from exercising the authority with which section 201(a) attempts to vest in him."[309]

The day after enacting the 1965 Flood Control Act (Public Law 89-298), Congress enacted a public works appropriations act (Public Law 89-299) providing the Army Corps of Engineers with about $993 million to construct "river and harbor, flood control, shore protection, and related projects."[310]

305 Pub. L. No. 89-298, §§ 201(a), 222, 79 Stat. 1073, 1073, 1089 (1965), https://tinyurl.com/4mp398bn.

306 *Id.* § 201(a), 79 Stat. at 1073, https://tinyurl.com/4mp398bn.

307 Statement by the President Upon Signing the Omnibus Rivers and Harbors Bill, 2 Pub. Papers, *supra*, at 1083, https://tinyurl.com/52yrvf4h. Johnson's objection was well taken, but that would not become evident for nearly another two decades, when the Supreme Court invalidated a somewhat similar "legislative veto" provision in INS v. Chadha, 462 U.S. 919 (1983).

308 Statement by the President Upon Signing the Omnibus Rivers and Harbors Bill, 2 Pub. Papers, *supra*, at 1083, https://tinyurl.com/52yrvf4h.

309 *Id.*

310 Pub. L. No. 89-299, 79 Stat. 1096, 1097 (1965), https://tinyurl.com/tbxyw7h5.

The appropriation provided that the funds would "remain available until expended," but barred the Army from using them "for projects not authorized by law," an evident cross-reference to the project-approval requirement in the Flood Control Act.[311]

It is not clear if Johnson impounded funds made available under this appropriation as a result of his objection to section 201's committee-approval requirement. Section 204 of the 1965 Flood Control Act "adopted and authorized" numerous other flood control projects that were not subject to a committee approval requirement, and directed that those projects "shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements."[312] The administration later reported spending $934 million of its $993 million appropriation for fiscal year 1966.[313] Although this amounts to an underexpenditure of almost $60 million, because the relevant appropriation was "to remain available until expended," the administration was not required to spend the full amount in a single fiscal year. Moreover, it is not clear whether Johnson's objection to section 201(a), or other programmatic factors, caused the underexpenditure.

311 *Id.*

312 Pub. L. No. 89-298, § 204, 79 Stat. at 1074-85, https://tinyurl.com/2e4bpf7t.

313 U.S. Bureau of the Budget, Exec. Off. of the President, Budget of the United States Government for Fiscal Year 1968, at 245 (1967), https://tinyurl.com/2ddy6cpw.

Lyndon Johnson

1965

WATERSHED PROJECT 2: PUBLIC LAW 83-566

NOT AN IMPOUNDMENT

ALLEGED IMPOUNDMENT

Potential impoundment #2: Funds for watershed projects under Public Law 83-566

ASSESSMENT

We found **no evidence that Johnson impounded funds** for small watershed projects under the relevant appropriation.

CRA claims that "[i]n 1965, Johnson impounded funds for watershed projects in order to voice his opposition to the legislative procedures used to appropriate the funds."[314] CRA cites Louis Fisher's *Presidential Spending Power* in support of this claim.[315] Fisher, in turn, cites a 1969 floor speech by Rep. Montgomery, who asserted that Johnson withheld funding from "96 small watershed projects approved by both Houses of the 90th Congress" because Johnson objected to a committee approval procedure in the governing law, Public Law 83-566.[316] Although that law contained a committee approval procedure similar to the one in the 1965 Flood Control Act,[317]

314 CRA History at 18; https://tinyurl.com/35zkwp4z (citing Fisher, Presidential Spending Power, *supra*, at 166).

315 *Id.*

316 Fisher, Presidential Spending Power, *supra*, at 166 & n.52 (endnote 52 on page 308 citing Rep. Montgomery's 1969 floor remarks); 115 Cong. Rec. H5923-24 (daily ed. Mar. 11, 1969), https://tinyurl.com/heae9was (remarks by Rep. Montgomery on Public Law 566 small watershed projects).

317 *Compare* Pub. L. No. 83-566, § 2(2), 68 Stat. at 666, https://tinyurl.com/2jhuasyv, *with* Pub. L. No. 89-298, § 201(a), 79 Stat. at 1073, https://tinyurl.com/4mp398bn.

we found no evidence confirming that Johnson objected to the specific procedure in Public Law 83-566 or that he impounded funds on the basis of that objection.[318]

Indeed, the Johnson administration's reporting to Congress on its annual expenditures under the relevant appropriation — the Department of Agriculture's "watershed protection" appropriation[319] — seems to show that the administration obligated the appropriated funds in full.[320] Moreover, the standard statutory language for that appropriation provided both that funds "shall remain available until expended" — meaning they did not have to be spent in full in a single fiscal year — and that the current-year appropriation "shall be merged" with "the unexpended balances of funds heretofore appropriated or transferred to the Department for watershed protection purposes."[321] In other words, Congress anticipated that some of the funds made available for watershed projects might be left over at the end of the fiscal year, and it provided, in each annual appropriation, that those funds would be available for use in future fiscal years. Thus, even if the Johnson administration impounded some small amount of "watershed protection" funds from year to year, the underlying appropriation permitted that temporary impoundment and expressly allowed the use of such funds in the future.

In light of this statutory language and the administration's reporting on its "watershed protection" expenditures, it seems likely that the Johnson administration did not impound funds for the watershed projects Rep. Montgomery listed in his floor remarks, but rather that it prioritized other projects over the listed ones. Such action would have been consistent with the discretion that the administration was afforded in the underlying

318 Johnson's Public Papers from 1965-1968 do not mention any constitutional objection to the Public Law 83-566 committee approval procedure, whereas they do for the 1965 Flood Control Act and two bills with related requirements. See Statement by the President Upon Signing the Omnibus Rivers and Harbors Bill, 2 Pub. Papers, *supra*, at 1083-84, https://tinyurl.com/52yrvf4h (referring to Johnson's vetoes of the Northwest disaster relief bill and of a military authorization bill).

319 Two appropriations to the Department of Agriculture's Soil Conservation Service funded small watershed projects under Public Law 83-566: a "watershed planning" appropriation and a "watershed protection" appropriation. H.R. Rep. No. 9-364, at 20-21 (1965) (explaining the legislative history of the Department of Agriculture's watershed programs). The "watershed planning" appropriation tended to be around $6 million, whereas the "watershed protection" appropriation tended to be for significantly larger amounts (around $70 million). See, e.g., Pub. L. No. 89-556, 80 Stat. 689, 692-93 (1966), https://tinyurl.com/5fj2dx79; Pub. L. No. 90-113, 81 Stat. 319, 323-24 (1967), https://tinyurl.com/yw2e75c8; Pub. L. No. 90-463, 82 Stat. 639, 642-43 (1968), https://tinyurl.com/mvr2jmv5. Because Rep. Montgomery's chart of watershed projects from which Johnson allegedly withheld funds lists total project costs in the tens of millions of dollars, we assume that Montgomery was referring to projects that would have received funding under the "watershed protection" appropriation. *See* 115 Cong. Rec. H5923-24 (daily ed. Mar. 11, 1969), https://tinyurl.com/heae9was.

320 *Budget of the United States Government for Fiscal Year 1968*, *supra*, at 202, https://tinyurl.com/ku7xz6sm (reporting on final fiscal year 1966 obligational authority and expenditures for watershed protection); U.S. Bureau. of the Budget, Exec. Off. of the President, *Budget of the United States Government for Fiscal Year 1969*, at 233 (1968), https://tinyurl.com/2szsu4tm (reporting on final fiscal year 1967 obligational authority and expenditures for watershed protection); U.S. Bureau. of the Budget, Exec. Off. of the President, *Budget of the United States Government for Fiscal Year 1970*, at 224 (1969), https://tinyurl.com/mfba8657 (reporting on final fiscal year 1968 obligational authority and expenditures for watershed works of improvement).

321 Pub. L. No. 89-556, 80 Stat. at 692-93, https://tinyurl.com/5fj2dx79; Pub. L. No. 90-113, 81 Stat. at 323-24, https://tinyurl.com/yw2e75c8; Pub. L. No. 90-463, 82 Stat. at 642-43, https://tinyurl.com/mvr2jmv5.

appropriation, which provided a lump sum for an array of different watershed protection efforts[322] but did not specify an order in which those efforts should be undertaken.

322 Eligible watershed protection efforts included "river basin surveys and investigations, and research," and "preventive measures, including, but not limited to, engineering operations, methods of cultivation, the growing of vegetation, and changes in use of land." *See* Pub. L. No. 89-556, 80 Stat. at 692-93, https://tinyurl.com/5fj2dx79; Pub. L. No. 90-113, 81 Stat. at 323-24, https://tinyurl.com/yw2e75c8; cf. Pub. L. No. 90-463, 82 Stat. at 642-43, https://tinyurl.com/mvr2jmv5 (similar but not the same statutory language).

Lyndon Johnson

1965–66

NUCLEAR-POWERED GUIDED MISSILE FRIGATE

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "Johnson also impounded funding for … a nuclear-powered guided missile ship," the DLGN-36.[323]

ASSESSMENT

This impoundment was **authorized by statute**. In a 1965 defense authorization act, Congress authorized an appropriation of $1.72 billion for naval vessels, but provided that "$150,500,000 is authorized only for the construction of a nuclear powered guided missile frigate."[324] In the appropriations act that followed, Congress appropriated $1.6 billion for naval "Shipbuilding and Conversion," which was "to remain available until expended."[325] Committee reports accompanying the final bill show that Congress included within that amount $20 million for "advanced procurement of long lead time items required for the construction of a nuclear powered guided missile frigate."[326] However, the appropriation made no specific mention of a nuclear-powered ship. The Defense Department, which opposed construction of the frigate, refused to release those funds to the Navy.[327]

The following year, Congress passed legislation that pushed the executive branch to build the ship, but that contained an explicit loophole. The language authorizing funds for the ship stated that the administration "shall" enter into a contract to build the ship "as soon as practicable unless the President fully advises the Congress that its construction is not in the national interest."[328] Members of the House Armed Services Committee had pushed for "strong mandatory language" (without such an exception) but were rebuffed by their Senate colleagues, who apparently did not want to deny the executive branch discretion over the building of the ship.[329] In the defense appropriations act that year, Congress appropriated over $1.75 billion for naval "Shipbuilding and Conversion," which was "to remain available until expended."[330] Although that appropriation again did not mention

323 CRA History at 18, https://tinyurl.com/35zkwp4z (citing Bale, *supra*, at 656, https://tinyurl.com/2s459faz (mentioning the DLGN-36)).
324 Pub. L. No. 89-37, 79 Stat. 127, 128 (1965), https://tinyurl.com/3v6djc4d.
325 Pub. L. No. 89-213, 79 Stat. 863, 869 (1965), https://tinyurl.com/5f47e4nu.
326 *Id.*; H.R. Rep. No. 89-528, at 40 (1965); S. Rep. No. 89-625, at 36 (1965).
327 John H. Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons Systems Appropriations*, 57 Geo. L.J. 1159, 1169-70 (1969); H.R. Rep. No. 90-221, at 6 (1967) ("Last year, … the Secretary of Defense had not released the $20 million to the Navy ….").
328 Pub. L. No. 89-501, 80 Stat. 275, 275 (1965), https://tinyurl.com/mu45sxvf.
329 Stassen, *supra*, at 1170-71.
330 Pub. L. No. 89-687, 80 Stat. 980, 986-87 (1966), https://tinyurl.com/mr3shdhw.

the nuclear-powered ship, committee reports show that Congress included $130.5 million within the "Shipbuilding and Conversion" appropriation for "construction of a nuclear powered guided missile frigate."[331]

Though the administration could have simply informed Congress that the building of the ship was not in the national interest, the secretary of defense instead released funding for the ship and permitted its construction.[332] Because the appropriations were to "remain available until expended," this delay in the release of funds was authorized by statute.

331 S. Rep. No. 89-1458, at 35 (1966) ("Concurrence is recommended in the House allowance of $130,500,000 for the construction of a nuclear powered guided missile frigate (DLGN). The total estimated cost of this ship is $150,500,000, of which $20 million was provided for the procurement of long leadtime items in the Department of Defense appropriation bill, 1966."); H.R. Rep. No. 89-1652, at 24 (1966); H.R. Rep. No. 89-2215, at 5 (1966) (Conf. Rep.) (noting, under appropriation for "Shipbuilding and Conversion, Navy," that "of the funds appropriated under this heading, $130,500,000 would be available only for the construction of a nuclear powered guided missile frigate ...").

332 *Id.* at 1172; *see* H.R. Rep. No. 90-221, *supra*, at 6 ("Last year, when the Secretary of Defense had not released the $20 million to the Navy, the Congress completed the funding of that frigate by adding $130.5 million and required the construction of the frigate unless the President advised the Congress fully as to his reasons for not finding that construction in the national interest. Only after this mandate did the Secretary of Defense reluctantly permit the construction of this frigate.").

Lyndon Johnson

1966

FEDERAL-AID HIGHWAY FUNDS

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "President Johnson impounded billions of dollars in funds appropriated for federal highways."[333] In support of this, CRA cites only a 1967 attorney general opinion considering the legality of a fiscal year 1967 deferral of nearly $700 million in federal highway funds.[334] This entry addresses that specific impoundment.

ASSESSMENT

This impoundment was **authorized by statute** and involved no claim of any constitutional authority to impound.

In 1966, Congress appropriated $3,898,400,000 for the federal highway trust fund, "to remain available until expended."[335] However, in light of the president's effort to reduce federal spending to curb inflation and in accordance with the Bureau of the Budget's instructions, the federal highway administrator limited highway trust fund obligations to $3.3 billion for fiscal year 1967.[336] As Acting Attorney General Ramsey Clark explained in an opinion on the matter, the "effect of the action is to defer to fiscal years subsequent to fiscal 1967 the obligation of funds in excess of $3.3 billion for Federal-aid highway projects. The reduction of funds was limited to the approval of future projects and did not affect the availability of funds for projects which already had been approved and which, pursuant to 23 U.S.C. 106(a), constitute contractual obligations of the United States."[337]

333 CRA History at 18, https://tinyurl.com/35zkwp4z.

334 *Id.* at 18 & nn.131-32; *Federal-Aid Highway Act of 1956 — Power of President to Impound Funds*, 42 Op. Att'y Gen. 347, 347-48 (1967), https://tinyurl.com/9cththu9.

335 Pub. L. No. 89-797, 80 Stat. 1479, 1495 (1966), https://tinyurl.com/29m6j27s.

336 42 Op. Att'y Gen. *supra*, at 347-48, https://tinyurl.com/9cththu9.

337 *Id.* at 348

After reviewing both the authorizing statutes governing the Federal-aid highway program and the fiscal year 1967 appropriation providing funds for it, Clark concluded that the secretary of transportation "has the power to defer the availability to the states of those funds authorized and apportioned for highway construction which have not, by the approval of a project, become the subject of a contractual obligation on the part of the Federal Government in favor of a State."[338] (Although Clark's opinion at times took a broad view of presidential power, a subsequent Department of Justice opinion on executive impoundment, written by then-Assistant Attorney General William Rehnquist, stated that Clark's opinion "appears to us to have been based on the construction of the particular statute, rather than on the assertion of a broad constitutional principle of executive authority."[339])

In a separate opinion on the legality of the highway deferral, the General Accounting Office reached the same conclusion as Clark. As Comptroller General Elmer Staats explained: "The General Accounting Office is responsible for seeing that appropriations made by the Congress are disbursed in accordance with the laws enacted by the Congress .... The permanent provisions of law governing the Federal-aid highway program are contained in title 23, United States Code. We find nothing in title 23 which specifically requires the Executive Branch to obligate in fiscal year 1967 all the Federal-aid highway funds available for obligation during that fiscal year, ... nor are we aware of such a requirement in any other law."[340]

Moreover, in a Senate hearing, during a discussion of Johnson's attempts to reduce spending in fiscal year 1967, Budget Bureau Director Charles Schultze clarified that, "[i]n the case of the highway trust fund, ... this is a deferral; the funds remain available and will be used for completion of the highway system."[341] In February and March of 1967, Johnson released $175 million and $350 million of the deferred highway funds, respectively.[342]

338 *Id.* at 348-50.

339 *Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools*, 1 Supp. Op. O.L.C. 303, 309 (Dec. 1, 1969), https://tinyurl.com/hf2t2y83.

340 Letter from Elmer Staats, U.S. Comp. Gen., to Rep. Jennings Randolph, Chair, House Comm. on Pub. Works (Feb. 24, 1967), *in* 1971 Hearings at 65-67, https://tinyurl.com/2knwfxue.

341 *The Budget for Fiscal Year 1968: Hearings Before the S. Comm. on Appropriations*, 90th Cong. 67 (1967), https://tinyurl.com/ydkwkr3c. In a subsequent exchange, Schultze elaborated further: "This is not a question of cutting the highway program. It is a question of deferring some of the construction. There is a big difference between cutting the overall highway program, where you would be quite right in the sense that you are completely flaunting the will of Congress, and exercising, I believe, a perfectly warranted Presidential judgment on economic conditions, by deferring the date at which that construction will be carried out." *Id.* at 77, https://tinyurl.com/5ackrbut.

342 President Lyndon Johnson, The President's News Conference (Feb. 27, 1967), https://tinyurl.com/rabx-weay; Statement by the President Announcing the Release of Deferred Funds for Federal Programs, 1 Pub. Papers 357 (Mar. 17, 1967), https://tinyurl.com/44y32vuk.

Lyndon Johnson

1966–71

CONSTRUCTION OF A NATIONAL AQUARIUM

AUTHORIZED

ALLEGED IMPOUNDMENT

According to CRA, "[i]n 1966, Johnson impounded funds for the construction of a national aquarium."[343]

ASSESSMENT

This impoundment was **authorized by statute**. In 1962, Congress passed a law that "authorized," but did not require, construction of the National Fisheries Center and Aquarium.[344] In 1965, Congress provided $9.2 million for that construction in an $11.2 million supplemental appropriation, which was "to remain available until expended," for the Interior Department's Bureau of Sport Fisheries and Wildlife.[345] The text of that appropriation stated only that the money was an additional amount for the bureau's "Construction" account,[346] which made funds available for an array of purposes: "construction and acquisition of buildings and other facilities required in the conservation, management, investigation, protection, and utilization of sport fishery and wildlife resources."[347] The supplemental appropriation itself did not mention the aquarium. Only committee reports specified that $9.2 million of that appropriation was intended "for construction of the National Fisheries Center and Aquarium."[348]

In a 1971 congressional hearing on impoundments, officials from the Department of the Interior testified that the $9.2 million Congress appropriated for the aquarium was placed in reserve from 1966 to 1971.[349]

During the hearing, these officials explained that the funds were initially placed in reserve because the aquarium could not be built until the design and planning process concluded, which did not occur until approval of the final plans in February 1969 (Johnson's presidency ended on January 20th, 1969).[350]

Although by the start of the Nixon administration the plans had been completed and the building of the aquarium could have commenced, Department of the Interior officials were instructed not to move forward.[351] In 1971, the funds "remain[ed] in reserve" and the administration recommended that the project be terminated.[352]

343 CRA History at 18, https://tinyurl.com/35zkwp4z.

344 Pub. L. No. 87-758, § 1(a), 76 Stat. 752, 752 (1962), https://tinyurl.com/tz6pcvej.

345 Pub. L. No. 89-309, 79 Stat. 1133, 1138 (1965), https://tinyurl.com/3j3h7zyv ("For an additional amount for 'Construction', $11,222,000, to remain available until expended."); H.R. Rep. No. 89-1162, at 21 (1965) (referencing "$9,240,000 for construction of the National Fisheries Center and Aquarium"); S. Rep. No. 89-912, at 17 (1965) (referencing "$9,240,000, for construction of the National Fisheries Center and Aquarium"); H.R. Rep. No. 89-1198, at 6 (1965) (Conf. Rep.).

346 Pub. L. No. 89-309, 79 Stat. at 1138, https://tinyurl.com/3j3h7zyv.

347 *See* Pub. L. No. 89-52, 79 Stat. 174, 184 (1965), https://tinyurl.com/bdxcfucx.

348 H.R. Rep. No. 89-1162, *supra*, at 21; S. Rep. No. 89-912, *supra*, at 17.

349 1971 Hearings at 211-17, https://tinyurl.com/4na7m8vs.

350 *Id.* at 211, 213, 216.

351 *Id.* at 212-13.

352 *Id.* at 216; *see id.* at 217 (explaining that the funds "ha[ve] been placed in budgetary reserve ... and [are] therefore unavailable for use"); U.S. Off. of Mgmt. & Budget, Exec. Off. of supra, President, *Budget of the United States Government for Fiscal Year 1972*, at 53 (1971), https://tinyurl.com/3393tzep (recommendation to "[t]erminate plans for a national fisheries center and aquarium").

At that point, the question is whether the Nixon administration was required by statute to build the aquarium or spend a particular sum of funds on it. The answer appears to be "no." In 1962, Congress "authorized," but did not require or direct, construction of the aquarium.[353] Appropriations acts for the Department of the Interior for fiscal years 1966–71 similarly indicate no requirement to build the aquarium or to spend a particular amount on it.[354] And in 1972, Congress acceded to the administration's request to terminate the project. In a conference committee report, lawmakers noted that they would use the unspent $9.2 million to fund other Bureau of Sport Fisheries and Wildlife construction projects.[355]

353 Pub. L. No. 87-758, § 1(a), 76 Stat. 752, 752 (1962), https://tinyurl.com/tz6pcvej.

354 Pub. L. No. 89-52, 79 Stat. 174, 184 (1965), https://tinyurl.com/bdxcfucx; Pub. L. No. 89-309, 79 Stat. at 1138, https://tinyurl.com/3j3h7zyv; Pub. L. No. 89-435, 80 Stat. 170, 179 (1966), https://tinyurl.com/2r-7ba34f; Pub. L. No. 90-28, 81 Stat. 59, 67 (1967), https://tinyurl.com/bdfc2u2j; Pub. L. No. 90-425, 82 Stat. 425, 434 (1968), https://tinyurl.com/565t9pk5; Pub. L. No. 91-98, 83 Stat. 147, 156 (1969), https://tinyurl.com/mrt8af48; Pub. L. No. 91-361, 84 Stat. 669, 677 (1970), https://tinyurl.com/34t78xec; Pub. L. No. 92-76, 85 Stat. 229, 236 (1971), https://tinyurl.com/mrs5mnu2.

355 H.R. Rep. No. 92-1250, at 7 (1972) (Conf. Rep.) ("The managers on the part of the House and the Senate agree to a total construction program for the Bureau of Sport Fisheries and Wildlife of $9,070,100 which shall be funded from the unobligated balance available as of July 1, 1972 of funds originally appropriated for construction of the National Fisheries Center and Aquarium."); *see* S. Rep. No. 92-921, at 14 (1972) ("The projects for which appropriations are recommended are to be constructed by use of unobligated funds ($9,150,000) heretofore appropriated for the National Fisheries Center and Aquarium.").

Lyndon Johnson

1966

AGRICULTURE APPROPRIATION

SEE INDIVIDUAL ANALYSIS BELOW

ALLEGED IMPOUNDMENT

According to CRA, "in 1966, Johnson objected to an agricultural appropriation bill that exceeded his budget request and 'proceeded to reduce expenditures for certain items 'in an attempt to avert expending more in the coming year than provided in the budget.'"[356]

ASSESSMENT

Eight reductions in this category are analyzed individually below. Seven were authorized by statute; one was not an impoundment.

As detailed further in the entries that follow, all of the significant cuts or deferrals that the Johnson administration made to agricultural appropriations were authorized by statute, with the exception of one which appears not to be an impoundment at all.

In 1966, due to concerns about inflation, Johnson decided that he needed to take steps to reduce government spending. In a special message to Congress, he estimated that about $3 billion in reductions would be needed "in that limited portion of the fiscal 1967 budget under direct Presidential control."[357]

One of the areas targeted for reductions by Johnson was agricultural appropriations. In his 1966 signing statement accompanying the Department of Agriculture and Related Agencies Appropriation Act, Johnson made clear

356 CRA History at 18, https://tinyurl.com/35zkwp4z.

357 President Lyndon Johnson, Special Message to the Congress on Fiscal Policy (Sept. 8, 1966), https://tinyurl.com/4njm2k2x. Johnson later explained in a news conference that the administration intended to make a $5.3 billion "budgetary cutback" to achieve a $3 billion reduction in actual federal expenditures for the remaining seven months of fiscal year 1967 (ending June 30, 1967). The President's News Conference of November 29, 1966, 2 Pub. Papers 1406-07 (Nov. 29, 1966), https://tinyurl.com/bddfwhf9.

that, despite that "Congress often adds to or reduces specific items proposed in the President's budget," and though this is "a proper exercise of congressional prerogative," he would nonetheless "reduce expenditures for the programs covered by this bill."[358] Johnson thought that Congress's addition of $312.5 million beyond his budget request was "most unwise" at a time when he was "making every effort to moderate inflationary pressures."[359]

In a press conference announcing his 1966 budget cuts, Johnson said that "[i]n the Department of Agriculture program reductions will be in excess of $400 million," with a resulting "$350 million in expenditure reduction."[360] In early 1967, his budget director, Charles Schultze, gave testimony to both the House Ways and Means Committee and the Senate Appropriations Committee detailing the cuts.[361] Schultze provided a table to Congress (Table 3) that lists 18 different expenditure reductions in Department of Agriculture spending, ranging from $0.4 to $100 million, and including deferrals.[362]

Below is an analysis of each of the eight expenditure reductions of $10 million or more, which account for more than 90 percent of the total expenditure reductions.[363] Seven of these reductions were authorized impoundments and one was not an impoundment.

In Johnson's public statements, he sometimes made vague and broad declarations about his authority as president — but he also frequently attempted to reassure Congress and the public that he was exercising restraint, following the law, and acting with congressional approval. He noted, for example, that more than half of the non-defense budget was made up of "payments fixed by law or otherwise uncontrollable."[364] Furthermore, he said that he had discussed his budget cuts "with 34 key Members of the House and Senate, including the leaders of both parties and members of the Appropriations Committees," and that "[t]hey believe that reductions are prudent and necessary for our national well-being."[365]

Johnson also eventually released $71 million in Department of Agriculture funds, stating that "[i]nflationary pressures have subsided."[366]

358 President Lyndon Johnson, Statement by the President Upon Signing the Department of Agriculture and Related Agencies Appropriation Bill (Sept. 8, 1966), https://tinyurl.com/4sjynh5m.

359 *Id.*

360 The President's News Conference of November 29, 1966, 2 Pub. Papers, *supra*, at 1409, https://tinyurl.com/bddfwhf9.

361 *Temporary Increase in Debt Ceiling: Hearings Before the H. Comm. on Ways and Means*, 90th Cong. 8-29 (1967) ("Schultze House Testimony"), https://tinyurl.com/y2y87vce; *The Budget for Fiscal Year 1968: Hearings Before the S. Comm. on Appropriations*, 90th Cong. 61-78, 114-15 (1967) ("Schultze Senate Testimony"), https://tinyurl.com/3xdt648m.

362 Schultze Senate Testimony at 69, https://tinyurl.com/5cxzjj6c; Schultze House Testimony at 23, https://tinyurl.com/bdhrswt9.

363 Note that, because of the time required to identify and analyze each of these appropriations, this analysis focuses on the most substantial sums ($10 million or more) that account for the large majority of the reductions. Furthermore, the descriptions of the expenditure reductions in Schultze's table are terse, occasionally even cryptic. Thus, there is in some cases a degree of uncertainty as to the nature of the actions taken, the identity of the programs affected, and the specific sources of their statutory authority. We have made our best effort to identify the programs at issue and the administration's statutory authority for the corresponding reductions or deferrals.

364 Special Message to the Congress on Fiscal Policy, *supra*, https://tinyurl.com/4njm2k2x.

365 President Lyndon Johnson, Statement by the President Announcing a Cutback in Federal Spending for the Current Fiscal Year (Nov. 29, 1966), https://tinyurl.com/3fzpeckw.

366 Statement by the President Announcing the Release of Deferred Funds for Federal Programs, 1 Pub. Papers, *supra*, at 357, https://tinyurl.com/44y32vuk.

Lyndon Johnson

1966

AGRICULTURE REDUCTIONS 1 AND 2: FOOD-FOR-FREEDOM

AUTHORIZED

ALLEGED IMPOUNDMENT

Agriculture reductions #1 and #2: (1) $100 million reduction, and (2) additional $25 million reduction (following preparation of 1968 budget estimates) in Public Law 480 food-for-freedom shipments[367]

ASSESSMENT

This impoundment was **authorized by statute**. Public Law 480 is a reference to the Agricultural Trade Development and Assistance Act of 1954, which, as amended, "authorize[d]" the president "to determine requirements and furnish agricultural commodities" obtained from the Commodity Credit Corporation (CCC) "to meet famine or other urgent or extraordinary relief requirements" abroad, and for other purposes.[368] The statute gave the Johnson administration the discretion to determine when and under what circumstances to "request" agricultural commodities from the CCC for foreign assistance, and provided that the president "may furnish" such commodities "in such manner and upon such terms and conditions as he deems appropriate."[369] For fiscal year 1967, in addition to $3.6 billion appropriated to cover CCC operating losses, including but not limited to losses due to administration of Public Law 480, Congress also appropriated $200 million, "to remain available until expended," specifically for "commodities disposed of for emergency famine relief to friendly peoples" pursuant to Public Law 480, as amended.[370]

Because Congress granted the president discretion in that law and made its 1966 appropriation of $200 million "available until expended,"[371] the Johnson administration had discretion to maintain expenditures for this program at levels below the appropriated amount.

367 Schultze Senate Testimony at 69, https://tinyurl.com/3xdt648m (where the two line items are labeled as "Commodity Credit Corporation: Public Law 480 — Food for freedom, reduction in shipments for 1967," and "Commodity Credit Corporation: Cut back shipments further under food-for-freedom program").

368 Pub. L. No. 89-808, § 2(C), 80 Stat. 1526, 1534-35 (1966), https://tinyurl.com/2yb6ttcj (codified at 7 U.S.C. §§ 1721-24); Pub. L. No. 83-480, 68 Stat. 454 (1954), https://tinyurl.com/3wrnawx3 (amended by Pub. L. No. 89-808).

369 Pub. L. No. 89-808, § 2(C), 80 Stat. at 1534-36, https://tinyurl.com/2yb6ttcj.

370 Pub. L. No. 89-556, 80. Stat. 689, 702-03 (1966), https://tinyurl.com/mwa9ny69.

371 *Id.*

Lyndon Johnson

1966

AGRICULTURE REDUCTION 3: SALES OF FARM LOANS

NOT AN IMPOUNDMENT

ALLEGED IMPOUNDMENT

Agriculture reduction #3: $86 million reduction in expenditures due to action to speed up sale of loans from the Agricultural Credit Insurance Fund[372]

ASSESSMENT

This was **not an impoundment**. This entry in Schultze's Table 3 appears to refer to accelerated sales by the Farmers Home Administration (FmHA) of real-estate secured loans made by private lenders to small family farmers

372 Schultze Senate Testimony at 69, https://tinyurl.com/3xdt648m (where the line item is labeled as "Farmers Home Administration: Agricultural credit insurance fund: Action to speed up sale of loans, including changing discount").

and ranchers and agricultural associations that the FmHA acquired in connection with its insurance (guarantees) of such loans, pursuant to authority conferred by the Consolidated Farmers Home Administration Act of 1961.[373] FmHA was "authorized" but not required by the statute to insure and purchase such loans, and could either hold such loans in the Agricultural Credit Insurance Fund (ACIF) or sell them.[374] Therefore the referenced action does not appear to involve a reduced expenditure of budget authority, but rather an adjustment to expected earnings from accelerated sales of loans in the ACIF portfolio.

373 Pub. L. No. 87-128, tit. III, subtit. A, §§ 302-09, 75 Stat. 294, 307-10 (1961), https://tinyurl.com/3wx26sre (codified at 7 U.S.C. §§ 1922-29 (1964), https://tinyurl.com/53nccmby).

374 *Id.*

Lyndon Johnson

1966

AGRICULTURE REDUCTION 4: FARM OPERATING LOANS

AUTHORIZED

ALLEGED IMPOUNDMENT

Agriculture reduction #4: $75 million reduction in Farmers Home Administration farm operating loans[375]

ASSESSMENT

This impoundment was **authorized by statute**. The Consolidated Farmers Home Administration Act of 1961, "authorized" but did not require the secretary of agriculture to make direct operating loans to family farmers and ranchers and soil conservation districts.[376] Furthermore, the relevant appropriations language provided that such loans "may be made from funds available," in the amount of $350,000,000.[377] The Johnson administration therefore had discretion to maintain expenditures for this program at levels below appropriated amounts. (On March 17, 1967, Johnson announced that he had released $25 million in "[f]arm operating loans."[378])

375 Schultze Senate Testimony at 69, https://tinyurl.com/3xdt648m (where the line item is labeled as "Farmers Home Administration: Direct loan account, operating loans — Reduction in farm operating loans").

376 Pub. L. No. 87-128, tit. III, subtit. B, §§ 311-16, 75 Stat. 294, 310-11 (1961), https://tinyurl.com/37h8r88v (codified at 7 U.S.C. §§ 1941-46 (1964), https://tinyurl.com/48e8839d).

377 Pub. L. No. 89-556, 80 Stat. at 700, https://tinyurl.com/4kbkepa4.

378 Statement by the President Announcing the Release of Deferred Funds for Federal Programs, 1 Pub. Papers, *supra*, at 357, https://tinyurl.com/44y32vuk.

Lyndon Johnson

1966

AGRICULTURE REDUCTION 5: AGRICULTURAL COMMODITIES

AUTHORIZED

ALLEGED IMPOUNDMENT

Agriculture reduction #5: $40 million reduction in Section 32 purchases of agricultural commodities by the Consumer and Marketing Service[379]

ASSESSMENT

This impoundment was **authorized by statute**. The Act of August 24, 1935,[380] known as Section 32, created a permanent appropriation (equal

379 Schultze Senate Testimony at 69, https://tinyurl.com/3xdt648m (where the line item is labeled as "Consumer and Marketing Service: Sec. 32, reduction in purchases of surplus commodities").

380 Pub. L. No. 74-320, ch. 641, § 32, 49 Stat. 750, 774 (1935), https://tinyurl.com/337tnzx7 (codified at 7 U.S.C. § 612c (1964)).

to 30 percent of annual customs duties receipts) for payments to encourage the exportation and domestic consumption of U.S. agricultural commodities, and to purchase surplus commodities to support farm income, such payments to be made "at such times, in such manner and in such amounts as the Secretary of Agriculture finds will effectuate substantial accomplishment of any one or more of the [statute's] purposes."[381] The statute, as amended, expressly provided that unobligated balances up to $300,000,000 would continue to remain available until expended.[382] Thus, the statute contemplated that the secretary may elect not to expend or obligate all appropriated funds in a given fiscal year, and provided that unspent amounts may be carried forward for use in future years. The Johnson administration therefore had discretion to maintain expenditures for this program at levels below appropriated amounts.

381 *Id.*
382 7 U.S.C. § 612c (1964), https://tinyurl.com/9mn3p9hr.

Lyndon Johnson

1966

AGRICULTURE REDUCTIONS 6 AND 7: RURAL ELECTRIFICATION

AUTHORIZED

ALLEGED IMPOUNDMENT

Agriculture reductions #6 & #7: (1) $27 million reduction in expenditures and (2) further $10 million reduction in expenditures (following preparation of 1968 budget estimates), from "[h]old[ing] down" new Rural Electrification Administration loan commitments, and postponing advances on prior commitments[383]

ASSESSMENT

This impoundment was **authorized by statute**. The Rural Electrification Act of 1936 "authorized and empowered," but did not require, the Rural Electrification Administration to make loans for rural electrification and the provision of rural telephone service.[384] That law authorized appropriations for such loans, and provided that "[i]f any part of the annual sums made available for the purposes of this Act shall not be loaned or obligated during the fiscal year for which such sums are made available, such unexpended or unobligated sums shall be available for loans by the Administrator in the following year or years ...."[385] Moreover, for fiscal year 1967 the relevant appropriation stated that funds for such loans, exceeding $490 million, were to "remain available without fiscal year limitation."[386] Therefore, the Johnson administration had statutory discretion to reduce or defer expenditures for rural electrification and telephone service loans (so long as consistent with prior commitments) even if additional appropriated funds for the programs remained available.

383 Schultze Senate Testimony at 69, https://tinyurl.com/3xdt648m (where the two line items are labeled as "Rural Electrification Administration: Loans, electric and telephone — Hold down loans to minimum essential needs" and "Rural Electrification Administration: Further pos[t]pone advances on prior loan commitments").
384 Pub. L. No. 74-605, ch. 432, 49 Stat. 1363, 1363-67 (1936), https://tinyurl.com/3cyvku9n; Pub. L. No. 81-423, ch. 776, 63 Stat. 948, 948-49 (1949), https://tinyurl.com/heb3puzh (amending Pub. L. No. 74-605) (codified at 7 U.S.C. §§ 901-24 (1964), https://tinyurl.com/5bx9sn9h).
385 Pub. L. No. 74-605, § 3(e), 49 Stat. at 1364, https://tinyurl.com/y8kjak93 (codified as amended at 7 U.S.C. § 903(e) (1964), https://tinyurl.com/yhyuun38).
386 Pub. L. No. 89-556, 80 Stat. at 700, https://tinyurl.com/4kbkepa4.

Lyndon Johnson

1966

AGRICULTURE REDUCTION 8: RESEARCH CONSTRUCTION

AUTHORIZED

ALLEGED IMPOUNDMENT

Agriculture reduction #8: $10.9 million due to "slowdown on research construction" for the Agricultural Research Service and Library[387]

ASSESSMENT

This impoundment was **authorized by statute**. The Department of Agriculture Organic Act of 1944 "authorized" but did not require the secretary of agriculture to "erect, alter, and repair such buildings and other public improvements as may be necessary to carry out [the department's] authorized work."[388] Pursuant to this authority, the relevant appropriation made funds available to the Agricultural Research Service (ARS) for the construction, alteration, and repair of buildings and improvements in connection with its agricultural research programs, animal and plant disease and pest control, and other activities.[389] The appropriation provided $123.4 million for ARS research programs generally, including but not limited to facilities construction and improvement, and stipulated that $11.2 million of that amount was to remain available for construction and improvement of agricultural research facilities until expended.[390] As these provisions and the Organic Act indicate, the administration had statutory discretion to spend less than the full amount set aside for ARS research construction.

387 Schultze Senate Testimony at 69, https://tinyurl.com/3xdt648m (where the line item is labeled "Agricultural Research Service and Library: Slowdown on research construction").

388 Pub. L. No. 78-425, ch. 412, tit. VII, § 703, 58 Stat. 734, 742 (1944), https://tinyurl.com/4c54dnxk (codified, until a 1966 revision of Title 5, at 5 U.S.C. § 565a, now codified at 7 U.S.C. § 2250).

389 Pub. L. No. 89-556, 80 Stat. at 689-90, https://tinyurl.com/mtwpk7bp.

390 *Id.* at 689.

Lyndon Johnson

1966

HOUSING AND URBAN DEVELOPMENT REDUCTIONS

SEE INDIVIDUAL ANALYSIS BELOW

ALLEGED IMPOUNDMENT

According to CRA, "Johnson also impounded funding for low-cost housing ...."[391]

ASSESSMENT

Four reductions in this category are analyzed individually below. All four were authorized by statute.

As detailed further below, all of the significant cuts or deferrals that the Johnson administration made to housing and urban development funds were authorized by statute.

In 1966, due to concerns about inflation, Johnson decided that he needed to take steps to reduce government spending. In a special message to Congress, he estimated that about $3 billion in reductions would be needed "in that limited portion of the fiscal 1967 budget under direct Presidential control."[392]

391 CRA History at 18, https://tinyurl.com/35zkwp4z.

392 Special Message to the Congress on Fiscal Policy, *supra*, https://tinyurl.com/4njm2k2x. Johnson later explained in a news conference that the administration intended to make a $5.3 billion "budgetary cutback" to achieve a $3 billion reduction in actual federal expenditures for the remaining seven months of fiscal year 1967 (ending June 30, 1967). The President's News Conference of November 29, 1966, 2 Pub.

One of the areas targeted for reductions by Johnson was housing and urban development appropriations. In a press conference announcing his 1966 budget cuts, Johnson said that there would be "in the neighborhood of $1 billion" of reductions "in housing and urban development."[393]

In early 1967, his budget director, Charles Schultze, gave testimony to both the House Ways and Means Committee and the Senate Appropriations Committee detailing the reductions.[394] Schultze provided to Congress a table (Table 3) that lists five different expenditure reductions in housing and urban development spending, ranging from $2.0 to $280 million, and including deferrals.[395]

Below is an analysis of the four expenditure reductions listed in Schultze's Table 3, under Housing and Urban Development, of $10 million or more, accounting for over 99 percent of the total.[396] As noted above, all four of these reductions were authorized by statute.

In Johnson's public statements, he sometimes made vague and broad declarations about his authority as president — but he also frequently attempted to reassure Congress and the public that he was exercising restraint, following the law, and acting with congressional approval. He noted, for example, that more than half of the non-defense budget was made up of "payments fixed by law or otherwise uncontrollable."[397] Furthermore, he said that he had discussed his budget cuts "with 34 key Members of the House and Senate, including the leaders of both parties and members of the Appropriations Committees," and that "[t]hey believe that reductions are prudent and necessary for our national well-being."[398]

Johnson also eventually released the majority of the deferred funds for the Department of Housing and Urban Development — $630 million[399] — stating that "[i]nflationary pressures have subsided."[400]

Papers, *supra*, at 1406-07, https://tinyurl.com/bddfwhf9.

393 The President's News Conference of November 29, 1966, 2 Pub. Papers, *supra*, at 1409, https://tinyurl.com/bddfwhf9.

394 Schultze House Testimony at 8-29, https://tinyurl.com/y2y87vce; Schultze Senate Testimony at 61-78, 114-15 https://tinyurl.com/3xdt648m.

395 Schultze Senate Testimony at 72, https://tinyurl.com/yyr2szb9; Schultze House Testimony at 25-26, https://tinyurl.com/bdvmeux9.

396 Note that, because of the time required to identify and analyze each of these appropriations, this analysis focuses on the most substantial sums ($10 million or more) that account for the large majority of the reductions. Furthermore, the descriptions of the expenditure reductions in Schultze's table are terse, occasionally even cryptic. Thus, there is in some cases a degree of uncertainty as to the nature of the actions taken, the identity of the programs affected, and the specific sources of their statutory authority. We have made our best effort to identify the programs at issue and the administration's statutory authority for the corresponding reductions or deferrals.

397 Special Message to the Congress on Fiscal Policy, *supra*, https://tinyurl.com/4njm2k2x.

398 Statement by the President Announcing a Cutback in Federal Spending for the Current Fiscal Year, *supra*, https://tinyurl.com/3fzpeckw.

399 This amount exceeds the 1967 reductions included in Schultze's Table 3, but it includes funds released prior to the announcement, the release of which may have predated Table 3.

400 Statement by the President Announcing the Release of Deferred Funds for Federal Programs, 1 Pub. Papers, *supra*, at 357, https://tinyurl.com/44y32vuk.

Lyndon Johnson

1966

HUD REDUCTION 1: LOW-COST MORTGAGES

AUTHORIZED

ALLEGED IMPOUNDMENT

Housing and urban development reduction #1: $280 million in low-cost housing mortgages[401]

ASSESSMENT

This impoundment was **authorized by statute**. At the time, the National Housing Act of 1934 "authorize[d]" but did not require the president — after considering "conditions in the building industry and the national economy," and "conditions affecting the home mortgage investment market," and finding it to be "in the public interest" — to "authorize" the Federal National Mortgage Association (FNMA) to purchase mortgages for low- and moderate-cost housing insured under 12 U.S.C. § 1715l(d)(3) and (h), subject to an aggregate $2.25 billion cap on mortgages held at any one time for this and other "special assistance functions" specified under 12 U.S.C. § 1720.[402]

Mortgage purchases under this "special assistance" authority appear to have been funded through borrowing authority — that is, a kind of budget authority "enacted to permit an agency to borrow money and then to obligate against amounts borrowed."[403] Specifically, it appears these mortgage purchases were funded through the issuance of FNMA stock, including preferred stock issued to the Department of the Treasury, and/or debt obligations FNMA was authorized, but not required, to issue to Treasury as needed to carry out its "special assistance functions" under 12 U.S.C. § 1720.[404] (HUD's fiscal year 1967 appropriations included no funds for purchases of mortgages to carry out FNMA's "special assistance" functions[405] or for purchases of other FNMA mortgages.)

Nothing in the statute authorizing FNMA's borrowing to fund mortgage purchases required it to obligate against the full amount borrowed. Because of this, and because FNMA was authorized but not required to purchase mortgages for low- and moderate-cost housing, the administration had discretion to reduce anticipated expenditures for this program.

401 Schultze Senate Testimony at 72, https://tinyurl.com/4v9cvffp (where the line item is labeled as "FNMA: Low cost housing mortgages" further noting that "Only $250,000,000 of the authority is now being used for mortgage purchases, the remainder is reserved for use if it should prove necessary").

402 Pub. L. No. 73-479, ch. 847, 48 Stat. 1246 (1934), https://tinyurl.com/2f3uv92b; Pub. L. No. 83-560, § 201, 68 Stat. 590, 616-17 (1954), https://tinyurl.com/mj7rnp7d (amending Pub. L. No. 73-479) (at the time codified, as further amended, at 12 U.S.C. § 1720(a), (c), (h) (1964), https://tinyurl.com/yc7m99f2); Pub. L. No. 89-117, § 801(a), 79 Stat. 451, 493 (1965), https://tinyurl.com/4mvketr6 (increasing the limit on authorized mortgage holdings for special assistance functions to $2.25 billion in fiscal year 1967).

403 GAO Glossary at 21, https://tinyurl.com/2f354mfd.

404 12 U.S.C. §§ 1718, 1720(d) (1964), https://tinyurl.com/3uxayn2k.

405 Pub. L. No. 89-555, 80 Stat. 663, 683 (1966), https://tinyurl.com/54sb63d7; Supplemental Appropriations Act, 1967, Pub. L. No. 89-697, 80 Stat. 1057, 1058-59 (1966), https://tinyurl.com/4adkuaas.

Lyndon Johnson

1966

HUD REDUCTION 2: SECONDARY MARKET MORTGAGES

AUTHORIZED

ALLEGED IMPOUNDMENT

Housing and urban development reduction #2: $176 million reduction in expenditures for "FNMA secondary market mortgage purchases"[406]

ASSESSMENT

This impoundment was **authorized by statute**. At the time, under the National Housing Act, the FNMA was "authorized" to purchase, sell, and otherwise deal in any mortgages which are insured under the Act, without prior authorization by the president, for purposes, inter alia, of facilitating the secondary mortgage market, but not mandated to do so by the pertinent provisions.[407]

Mortgage purchases for FNMA's "[s]econdary market operations" under 12 U.S.C. § 1719 appear to have been funded through borrowing authority — that is, a kind of budget authority "enacted to permit an agency to borrow money and then to obligate against amounts borrowed."[408] Specifically, it appears these mortgage purchases were funded through the issuance of stock, including preferred stock issued to the Department of the Treasury, and/or debt obligations that FNMA was authorized, but not required, to issue to Treasury.[409] (HUD's fiscal year 1967 appropriations included no funds for purchases of mortgages to carry out FNMA's secondary market operations,[410] or for purchases of other mortgages.)

Nothing in the statute authorizing FNMA's borrowing to fund mortgage purchases required it to obligate against the full amount borrowed. Because of this, and because FNMA was authorized but not required to purchase mortgages for secondary market operations, the administration had discretion to reduce anticipated expenditures for this program.

406 Schultze Senate Testimony at 72, https://tinyurl.com/4v9cvffp (where the line item is labeled as "Preferred stock purchase (net): Restrictions on FNMA secondary market mortgage purchases have been maintained to avoid the necessity of any net purchase of preferred stock this year").

407 12 U.S.C. §§ 1717(b), 1719 (1964), https://tinyurl.com/yc2vt8mh; *see* Pub. L. No. 73-479, ch. 847, 48 Stat. 1246, https://tinyurl.com/2f3uv92b; Pub. L. No. 83-560, § 201, 68 Stat. at 613, 618, https://tinyurl.com/mr22w5ap (amending Pub. L. No. 73-479) (at the time codified, as further amended, at 12 U.S.C. §§ 1717(b), 1719 (1964)).

408 GAO Glossary at 21, https://tinyurl.com/2f354mfd.

409 12 U.S.C. §§ 1718, 1719(a)(1)-(2), (b), (c) (1964), https://tinyurl.com/3uxayn2k.

410 Pub. L. No. 89-555, 80 Stat. at 683, https://tinyurl.com/54sb63d7; Supplemental Appropriations Act, 1967, Pub. L. No. 89-697, 80 Stat. at 1058-59, https://tinyurl.com/4adkuaas.

Lyndon Johnson

1966

HUD REDUCTION 3: MULTIFAMILY HOUSING CONSTRUCTION

AUTHORIZED

ALLEGED IMPOUNDMENT

Housing and urban development reduction #3: $75 million reduction in expenditures for "FNMA construction financing of certain multifamily housing"[411]

ASSESSMENT

This impoundment was **authorized by statute**. This action appears to fall within FNMA's same discretionary National Housing Act authority (noted immediately above) regarding the purchase and sale of mortgages insured under the Act in connection with FNMA's secondary market operations (the Act provided for federal insurance of certain multi-family housing mortgages).[412] (And, as also noted immediately above, such purchases appear to have been funded through borrowing authority — that is, FNMA issuances of stock and/or issuance of debt obligations to Treasury — rather than through appropriations.)

Therefore the administration had discretion to reduce anticipated expenditures for this program.

411 Schultze Senate Testimony at 72, https://tinyurl.com/4v9cvffp (where the line item is labeled as "FNMA construction financing of certain multifamily housing: New authority is not to be used").

412 12 U.S.C. §§ 1717(b), 1719 (1964), https://tinyurl.com/yc2vt8mh; *see* Pub. L. No. 87-70, 75 Stat. 149, 160 (1961), https://tinyurl.com/3m7vn862 (adding National Housing Act § 234) (codified as amended, 12 U.S.C. § 1715y (1964), https://tinyurl.com/w63mhwbc).

Lyndon Johnson

1966

HUD REDUCTION 4: URBAN RENEWAL GRANTS

AUTHORIZED

ALLEGED IMPOUNDMENT

Housing and urban development reduction #4: $10 million reduction in urban renewal program grants and loan disbursements to local public agencies[413]

ASSESSMENT

This impoundment was **authorized by statute**. The reference evidently is to urban renewal grants and loans made to local public agencies under Title I of the Housing Act of 1949[414] and section 314 of the Housing Act of 1954.[415] These statutes provided that the Housing and Home Finance Administration (later succeeded by the Department of Housing and Urban Development) was "authorized" to make and "may make," but was not required to make, loans and grants to local public agencies and other public bodies to finance various urban renewal projects.[416] For fiscal year 1967, Congress appropriated $725 million to these grant programs "to remain available until

413 Schultze Senate Testimony at 72, https://tinyurl.com/4v9cvffp (where the line item is labeled as "Reduction in grant and loan disbursements resulting from holding local public agency working balances to very low level," under "Urban renewal program (reestimate results from tight money market)").

414 Pub. L. No. 81-171, 63 Stat. 413 (1949), https://tinyurl.com/yzf4ttv5 (as amended) (at the time codified at 42 U.S.C. §§ 1450-65 (1964), https://tinyurl.com/46kby5wf).

415 Pub. L. No. 83-560, ch. 649, 68 Stat. at 629-30, 640, https://tinyurl.com/y3z8mesh (then codified at 42 U.S.C. § 1452a (1964), https://tinyurl.com/bdd29zzd). *See* Pub. L. No. 89-555, 80 Stat. at 681, https://tinyurl.com/2s4274kk.

416 42 U.S.C. §§ 1452, 1452a, 1452b, 1453 (1964), https://tinyurl.com/46kby5wf.

expended."[417] The Johnson administration therefore had discretion to maintain expenditures for these urban renewal programs at levels below the appropriated amounts (so long as consistent with prior grant and loan commitments).[418]

417 Pub. L. No. 89-309, 79 Stat. 1133, 1136 (1965), https://tinyurl.com/yck6fwdf. *See also* Pub. L. No. 89-555, 80 Stat. at 681, https://tinyurl.com/2s4274kk (appropriating $15 million for administrative expenses for urban renewal programs). (Urban renewal loans were funded with borrowings from the Treasury. 42 U.S.C. § 1452(e) (1964), https://tinyurl.com/46kby5wf.)

418 Schultze's Table 3 describes this action as a "[r]eduction in grant and loan disbursements resulting from holding local public agency working balances to very low level[s]." Schultze Senate Testimony at 72, https://tinyurl.com/4v9cvffp. This suggests an effort to manage the outflow of funds to recipient agencies more closely, perhaps by making disbursements in installments, or on a reimbursement basis to defray agencies' expenses as they incurred them, rather than by making lump-sum disbursements in advance. So long as these actions were consistent with the terms of recipients' grant and loan contracts, nothing in the terms of the Housing Act of 1949 or the Housing Act of 1954 constrained the administration's discretion to adopt these measures.

Lyndon Johnson

1966

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE REDUCTIONS

SEE INDIVIDUAL ANALYSIS BELOW

ALLEGED IMPOUNDMENT

According to CRA, "Johnson also impounded funding for ... the Department of Health, Education, and Welfare ...."[419]

ASSESSMENT

Six reductions in this category are analyzed individually below. Five were authorized by statute; one was not an impoundment.

As detailed further below, all of the significant cuts that the Johnson administration made to various student loan, regional medical, and construction grant programs at the Department of Health, Education, and Welfare (HEW) were authorized by statute. Moreover, all of them concern spending that was deferred rather than permanently withheld, and one reduction was not an impoundment at all. In short, none of these cuts reflects an effort to thwart Congress's will.

In 1966, due to concerns about inflation, Johnson decided that he needed to take steps to reduce government spending. In a special message to Congress, he estimated that about $3 billion in reductions would be needed "in that limited portion of the fiscal 1967 budget under direct Presidential control."[420]

One of the areas targeted for reductions by Johnson was HEW. In a press conference announcing his 1966 budget cuts, Johnson said that "[i]n the Department of Health, Education, and Welfare we will have ... about $275 million in expenditure reductions. That will be in the delayed start of a good deal of construction and the transfer of certain allocations that are unspent in certain areas."[421]

419 CRA History at 18, https://tinyurl.com/35zkwp4z.

420 Special Message to the Congress on Fiscal Policy, *supra*, https://tinyurl.com/4njm2k2x. Johnson later explained in a news conference that the administration intended to make a $5.3 billion "budgetary cutback" to achieve a $3 billion reduction in actual federal expenditures for the remaining seven months of fiscal year 1967 (ending June 30, 1967). The President's News Conference of November 29, 1966, 2 Pub. Papers, *supra*, at 1406-07, https://tinyurl.com/bddfwhf9.

421 The President's News Conference of November 29, 1966, 2 Pub. Papers, *supra*, at 1409, https://tinyurl.com/bddfwhf9.

In early 1967, his budget director, Charles Schultze, gave testimony to both the House Ways & Means Committee and the Senate Appropriations Committee detailing the reductions.[422] The table Schultze provided to Congress (Table 3) lists over 40 different HEW reductions, ranging from $0.1 to $61.7 million, largely deferrals rather than cuts.[423] As Schultze noted in his testimony, "with respect to deferrals, for example, in the case of the ... HEW projects," "the money will be spent later."[424]

Below is an analysis of each of the six reductions of $10 million or more (excluding the elementary and secondary education programs, discussed further below separately), which account for more than 70 percent of the total.[425] Five of these reductions were authorized by statute, and one was not an impoundment.

In Johnson's public statements, he sometimes made vague and broad declarations about his authority as president — but he also frequently attempted to reassure Congress and the public that he was exercising restraint, following the law, and acting with congressional approval. He noted, for example, that more than half of the non-defense budget was made up of "payments fixed by law or otherwise uncontrollable."[426] Furthermore, he said that he had discussed his budget cuts "with 34 key Members of the House and Senate, including the leaders of both parties and members of the Appropriations Committees," and that "[t]hey believe that reductions are prudent and necessary for our national well-being."[427]

422 Schultze House Testimony at 8-29, https://tinyurl.com/y2y87vce; Schultze Senate Testimony at 61-78, 114-15, https://tinyurl.com/3xdt648m.

423 Schultze Senate Testimony at 70-72, https://tinyurl.com/bdd459h4; Schultze House Testimony at 24-25, https://tinyurl.com/mr28keje.

424 Schultze Senate Testimony at 67, 114, https://tinyurl.com/ydkwkr3c.

425 *See* Schultze Senate Testimony at 70-72, https://tinyurl.com/bdd459h4. This analysis focuses only on the reductions of $10 million or more because of the time required to identify and analyze the appropriations and other laws implicated in each reduction. It is worth noting that the descriptions of the expenditure reductions listed in Schultze's table are terse, occasionally even cryptic. Thus, there is, in some cases, a degree of uncertainty as to the nature of the actions taken, the identity of the programs affected, and the specific sources of their statutory authority. We have made our best effort to identify the programs at issue and the administration's statutory authority for the corresponding reductions or deferrals.

426 Special Message to the Congress on Fiscal Policy, *supra*, https://tinyurl.com/4njm2k2x.

427 Statement by the President Announcing a Cutback in Federal Spending for the Current Fiscal Year, *supra*, https://tinyurl.com/3fzpeckw.

Lyndon Johnson

1966

HEW REDUCTION 1: HIGHER EDUCATION LOANS

NOT AN IMPOUNDMENT

ALLEGED IMPOUNDMENT

HEW reduction #1: $30.8 million reduction: "Higher education loan[s]," due to program reduction of $100 million to be carried over for use in 1968[428]

ASSESSMENT

This reduction was **not an impoundment**. The referenced action appears to concern the federal guaranteed student loan program, as authorized by the Higher Education Act of 1965.[429] At the time the statute provided that upon

428 Schultze Senate Testimony at 70, https://tinyurl.com/ycx927he (where the line item is labeled as "Higher education loan fund: Program level reduced from $300,000,000 to $200,000,000. $100,000,000 is carried over for use in 1968 program," under "Education").

429 Pub. L. No. 89-329, tit. IV, pt. B, §§ 421-35, 79 Stat. 1219, 1236-49 (1965), https://tinyurl.com/424k4h89 (as amended) (codified at 20 U.S.C. §§ 1071-85).

receipt and approval of an application from an eligible lender, the HEW commissioner of education "may issue … a certificate of insurance" to the lender covering a single insurable higher-education loan, or all such loans made by the lender within a specified period and subject to an aggregate maximum amount stated in the certificate,[430] subject also to a statutory cap on the aggregate principal amount of all loans covered (in fiscal year 1967, $1 billion).[431] The Act established a student loan insurance fund for payments to lenders in connection with defaults on insured loans.[432]

It appears that, by temporarily reducing the aggregate principal amount of student loans to be insured "from "$300,000,000 to $200,000,000,"[433] the Johnson administration expected to induce lenders to make fewer loans during the fiscal year, thereby slowing inflation. Because the statute authorized but did not require the commissioner to insure all or even a minimum aggregate principal amount of eligible student loans, the described "program reduction" for fiscal year 1967, with carryover to fiscal year 1968, appears to have fallen within the administration's discretion.

In addition, the "program reduction" appears to have involved a policy change rather than a reduction in the expenditure of appropriated funds: lowering the aggregate principal amount of loans insured by the commissioner for the remainder of fiscal year 1967. Therefore, the action was both consistent with statute and did not appear to involve any impoundment.

430 *Id.* § 429, 79 Stat. at 1243, https://tinyurl.com/2p9kejd4 (codified at 20 U.S.C. § 1079).
431 *Id.* § 424, 79 Stat. at 1237-38, https://tinyurl.com/mr3tcuad (codified at 20 U.S.C. § 1074).
432 *Id.* § 431, 79 Stat. at 1245-46, https://tinyurl.com/25mdtcd9 (codified at 20 U.S.C. § 1081).
433 Schultze Senate Testimony at 70, https://tinyurl.com/ycx927he.

Lyndon Johnson

1966

HEW REDUCTION 2: CONSTRUCTION GRANTS

AUTHORIZED

ALLEGED IMPOUNDMENT

HEW reduction #2: $61.7 million reduction due to deferral in grants for construction of "[a]cademic facilities," "research construction," and "research and training project[s]."[434]

ASSESSMENT

This impoundment was **authorized by statute**. The referenced action appears to concern grants for the construction of undergraduate and graduate academic facilities authorized by Titles I and II of the Higher Education Facilities Act of 1963 ("HEFA"),[435] and grants for research, surveys, and demonstrations in the field of education authorized by the Act of July 26, 1954 (later known as the Cooperative Research Act).[436]

434 Schultze Senate Testimony at 70, https://tinyurl.com/ycx927he (where the line item is labeled as "Academic facilities construction, research construction, and research and training project grants: Defer construction and new project grants," under "Education").
435 Pub. L. No. 88-204, tits. I & II, 77 Stat. 363, 363-72 (1963), https://tinyurl.com/yx32awx3; Pub. L. No. 89-329, §§ 701-702(d), 79 Stat. 1219, 1266-68 (1965), https://tinyurl.com/4jacepd2 (amending Pub. L. No. 88-204); Pub. L. No. 89-752, §§ 2-4, 80 Stat. 1240, 1240-42 (1966), https://tinyurl.com/ys26x36y (same) (codified at 20 U.S.C. §§ 711-33).
436 Pub. L. No. 83-531, 68 Stat. 533 (1954), https://tinyurl.com/2hsez7hv; Pub. L. No. 89-10, §§ 401-03, 79 Stat. 27, 44-47 (1965), https://tinyurl.com/rf4x9cmw (amending Pub. L. No. 83-531); Pub. L. No. 89-750, §§ 141-43, 80 Stat. 1191, 1202-03 (1966), https://tinyurl.com/bdfk67yf (formerly codified at 20 U.S.C. §§ 331-332b).

Title I of HEFA directed the commissioner of education, upon receipt and approval of applications from eligible institutions of higher education, to award grants to such institutions from appropriations allocated among the states according to a prescribed formula, for the construction of undergraduate academic facilities meeting certain statutory requirements. The statute authorized the commissioner to pay grants in advance, by way of reimbursement, or in installments as he determined, and further provided that funds appropriated for the purpose of these grants would remain available until the close of the next succeeding fiscal year.[437] The Supplemental Appropriations Act, 1967, appropriated $453 million for Title I grants, to remain available through the close of fiscal year 1968.[438]

Title II of HEFA directed the commissioner, upon receipt and approval of applications from eligible institutions of higher education, to award grants to such institutions for the construction of graduate academic facilities meeting certain statutory criteria, and provided that sums appropriated for this purpose were to remain available until expended.[439] The Supplemental Appropriations Act, 1967, appropriated $60 million for Title II grants to remain available until expended.[440]

The Cooperative Research Act "authorized," but did not require, the commissioner to make grants available to public or non-profit universities, colleges, or other public or non-profit agencies, institutions, or organizations, for research, surveys, and demonstrations, and the construction of regional research facilities, in the field of education. The Act further provided that appropriated funds allocated to construction projects for which applications were submitted before July 1, 1970, and approved by the commissioner before July 1, 1971, were to remain available until expended.[441] Congress made $70 million in fiscal year 1967 funding available for these purposes, up to $12.4 million of which was to remain available for the construction of regional research facilities until expended.[442]

The administration therefore had discretion to defer awards of HEFA Title I and Title II grants, and to maintain expenditures for educational research under the Act of July 6, 1954, at levels below appropriated amounts. (And as Budget Director Schultze noted in his Senate testimony, "with respect to deferrals, for example, in the case of the … HEW projects," "the money will be spent later.")[443]

437 20 U.S.C. § 711-19 (1964), https://tinyurl.com/ms2w6b2z.

438 Pub. L. No. 89-697, 80 Stat. at 1061, https://tinyurl.com/5n98cwrj.

439 20 U.S.C. §§ 731-32 (1964), https://tinyurl.com/muehbk4a; Pub. L. No. 89-752, § 4, 80 Stat. 1240, 1242 (1966), https://tinyurl.com/y3jfw6zn (amending 20 U.S.C. § 731 and providing that amounts "appropriated pursuant to this title for any fiscal year shall remain available for grants under this title until expended").

440 Pub. L. No. 89-697, 80 Stat. at 1061, https://tinyurl.com/5n98cwrj.

441 Pub. L. No. 89-10, §§ 401-03, 79 Stat. at 44-47, https://tinyurl.com/rf4x9cmw (amending Pub. L. No. 83-531); Pub. L. No. 89-750, §§ 141-143, 80 Stat. at 1202-03 (same), https://tinyurl.com/bdfk67yf.

442 Pub. L. No. 89-787, 80 Stat. at 1385, https://tinyurl.com/59xv29zx.

443 Schultze Senate Testimony at 67, 114, https://tinyurl.com/ydkwkr3c.

Lyndon Johnson

1966

HEW REDUCTION 3: DEFERRAL OF NEW PROJECTS

AUTHORIZED

ALLEGED IMPOUNDMENT

HEW reduction #3: $13.2 million reduction in expenditures due to deferral of new projects in federally impacted areas.[444]

ASSESSMENT

This impoundment was **authorized by statute**. Public Law 81-815[445] authorized payments to assist local school districts (at varying rates of subsidy) in the construction of additional school facilities needed to accommodate enrollments of children (i) residing on federal property, (ii) residing on federal property with a parent employed on federal property, (iii) residing with a parent employed on federal property, or (iv) whose attendance otherwise ensuing from federal activities substantially increased enrollment.[446] In the event a local school district was unable to provide for the education of such children, the statute directed the commissioner of education to make arrangements for constructing or otherwise providing necessary school facilities for their education.[447] The act provided that sums appropriated for these purposes were to "remain available until expended."[448]

An Office of Legal Counsel (OLC) opinion from 1969 briefly considered precisely the question at issue here: whether it was legal for the president to defer expenditures of funds appropriated to carry out Public Law 81-815.[449] The opinion stated that "it does appear to us that there are enough discretionary powers throughout the statute to permit [the commissioner of education] to postpone the obligation of funds."[450] It went on to say that the language in the fiscal year 1970 appropriation saying that the funds "shall remain available until expended … would seem to confirm the conclusion that there is no legal requirement that the funds be obligated in the year for which the appropriation is made."[451] Since that language — to "remain available until expended" — was also used in both Public Law 81-815 itself, as noted above, and the corresponding appropriation for school construction in federally affected areas for fiscal year 1967,[452] and because that appropriation further provided that "applications filed on or before June 30, 1966, shall receive priority over applications filed after such date,"[453] it seems clear that the Johnson administration had the authority to defer expenditures on the "new

444 Schultze Senate Testimony at 70, https://tinyurl.com/ycx927he (where the line item is labeled as "Federally impacted areas: Defer new projects," under "Education").

445 Pub. L. No. 81-815, 64 Stat. 967, 967-78 (1950), https://tinyurl.com/4hk33n7n (as amended) (formerly codified at 20 U.S.C. §§ 631-45 (1964), https://tinyurl.com/2u6cwp7e).

446 20 U.S.C. §§ 631, 633-36 (1964), https://tinyurl.com/2u6cwp7e.

447 *Id.* § 640 (1964), https://tinyurl.com/3b6p9wpv.

448 *Id.* § 631 (1964), https://tinyurl.com/2u6cwp7e.

449 *Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools*, 1 Supp. Op. O.L.C. 303, 306-07 (Dec. 1, 1969), https://tinyurl.com/zxff6mj7.

450 *Id.* at 306.

451 *Id.*

452 Pub. L. No. 89-787, 80 Stat. 1378, 1384 (1966), https://tinyurl.com/43v3p8ju (Providing, under the heading "Assistance for School Construction," "$22,937,000, to remain available until expended").

453 *Id.*

projects" referenced in Schultze's testimony.[454] (And as Schultze stated, "with respect to deferrals, for example, in the case of the ... HEW projects," "the money will be spent later.")[455]

454 *See* Schultze Senate Testimony at 70, https://tinyurl.com/ycx927he.
455 *Id.* at 67, 114, https://tinyurl.com/ydkwkr3c.

Lyndon Johnson

1966

HEW REDUCTION 4: PUBLIC HEALTH SERVICE EXPENDITURES

AUTHORIZED

ALLEGED IMPOUNDMENT

HEW reduction #4: $55.9 million reduction in Public Health Service expenditures due to deferred hospital construction starts[456]

ASSESSMENT

This impoundment was **authorized by statute**. The expenditures at issue involved grants and loans for hospital and other facilities construction. Many if not most of these expenditures were likely mandated by statute (upon receipt and approval of applications from eligible state or local agencies or non-governmental institutions).[457] However, the relevant appropriation also made clear that substantial sums — exceeding the $55.9 million at issue here — were available until the close of fiscal year 1968, and in two cases "until expended."[458] Therefore, the Johnson administration's deferral of these funds was likely authorized by statute. And as Budget Director Schultze noted in his Senate testimony, "with respect to deferrals, for example, in the case of the ... HEW projects," "the money will be spent later."[459]

456 *Id.* at 71, https://tinyurl.com/5frpz5yt (where the line item is labeled as "Hospital construction activities: Defer construction starts," under "Public Health Service").
457 Hospital & Medical Facilities Amendments Act of 1964, Pub. L. No. 88-443, §§ 2, 3, 78 Stat. 447, 447-57 (1964), https://tinyurl.com/5n8a82rv (adding new § 318 and §§ 601-607 to the Public Health Service Act, to provide for mandatory formula grants to states for construction and modernization of hospitals and other medical facilities); Mental Retardation Facilities & Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, §§ 131-37, 201-07, 77 Stat. 282, 286-94 (1963), https://tinyurl.com/5n8ym28r (mandatory formula grants to states for construction of community mental health centers and facilities for the mentally retarded); *see* Pub. L. No. 89-787, 80 Stat. at 1390, https://tinyurl.com/y7rpkat7 (making appropriations for hospital construction activities conducted pursuant to these statutes); *but see* Pub. L. No. 88-443, § 3, 78 Stat. at 457, https://tinyurl.com/26cc5nwy (adding new Public Health Service Act § 610, authorizing but not mandating loans for projects meeting grant requirements under §§ 601-607); Pub. L. No. 88-443, 78 Stat. at 459, https://tinyurl.com/45vy6rc4 (adding new Public Health Service Act § 624, authorizing discretionary grants to state and local governments and other public and non-profit institutions for research relating to, inter alia, construction of experimental hospitals); Pub. L. No. 88-164, tit. I, pt. B, §§ 121-25, 77 Stat. at 284-85, https://tinyurl.com/5n8ym28r (discretionary competitive grants to university-affiliated hospitals for construction of demonstration facilities for the "diagnosis and treatment, education, training, or care of the mentally retarded"); Appalachian Regional Development Act of 1965, Pub. L. No. 89-4, tit. II, § 202, 79 Stat. 5, 11-12 (1965), https://tinyurl.com/435wv56a; Appalachian Regional Development Act Amendments of 1967, Pub. L. No. 90-103, § 107, 81 Stat. 257, 259-60 (1967), https://tinyurl.com/mwyz3hb4 (amending Pub. L. No. 89-4) (discretionary grants for "planning, construction, equipment, and operation of multicounty demonstration health projects, including hospitals," in the Appalachian region).
458 Pub. L. No. 89-787, 80 Stat. at 1390, https://tinyurl.com/y7rpkat7 (providing $313.5 million for "hospital construction activities," of which "$170,000,000 shall be available until June 30, 1968 ..., for grants or loans for hospitals and related facilities pursuant to section 601(b) of the Public Health Service Act, $100,000,000 shall be available until June 30, 1968 ..., for grants or loans for facilities pursuant to section 601(a) of the Public Health Service Act, $5,000,000 shall be for special project grants pursuant to section 318 of the Public Health Service Act, $7,500,000 shall be for the purposes authorized in section 624 of the Public Health Service Act, $10,000,000, to remain available until expended, shall be for grants for facilities pursuant to part B of the Mental Retardation Facilities Construction Act, $15,000,000 shall be available until June 30, 1968, for grants for facilities pursuant to part C of the Mental Retardation Facilities Construction Act, and $2,500,000, to remain available until expended, shall be for grants for construction, equipment, and operation of demonstration health facilities under the Appalachian Regional Development Act of 1965 ...").
459 Schultze Senate Testimony at 67, 114 https://tinyurl.com/ydkwkr3c.

Lyndon Johnson

1966

HEW REDUCTION 5: REGIONAL MEDICAL PROGRAM

AUTHORIZED

ALLEGED IMPOUNDMENT

HEW reduction #5: $10 million reduction in expenditures due to slow down in planning and operating the regional medical program[460]

ASSESSMENT

This impoundment was **authorized by statute**. Public Law 89-239[461] "authorized," but did not require, the surgeon general to make grants to public or nonprofit private universities, medical schools, and research institutions to assist them in the development, construction, and operation of regional programs for cooperative research, training, diagnosis, and treatment relating to heart disease, cancer, or stroke, and related illnesses.[462] Moreover, the relevant appropriation of $43 million specified that the funds did not have to be spent until the end of fiscal year 1968.[463] The administration therefore had discretion, under the authorizing statute and appropriation, to "slow down" the expenditures at issue. And as Budget Director Schultze noted in his Senate testimony, "with respect to deferrals, for example, in the case of the … HEW projects," "the money will be spent later."[464]

460 *Id.* at 71, https://tinyurl.com/5frpz5yt (where the line item is labeled as "Regional medical program: Slow down planning and operating regional medical program," under "NIH").
461 Pub. L. No. 89-239, 79 Stat. 926, 926-31 (1965), https://tinyurl.com/zmsfhsmw (formerly codified at 42 U.S.C. §§ 299-299i, https://tinyurl.com/5n6fv8cv).
462 *Id.* §§ 900-04, 79 Stat. at 926-29, https://tinyurl.com/zmsfhsmw.
463 Pub. L. No. 89-787, 80 Stat. at 1393, https://tinyurl.com/3nbnkc57.
464 Schultze Senate Testimony at 67, 114, https://tinyurl.com/ydkwkr3c.

Lyndon Johnson

1966

HEW REDUCTION 6: COMMUNITY MENTAL HEALTH CENTERS

AUTHORIZED

ALLEGED IMPOUNDMENT

HEW reduction #6: $15.2 million reduction in expenditures due to deferred construction of community mental health centers[465]

ASSESSMENT

This impoundment was **authorized by statute** because the spending was deferred and not withheld. Title II of the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 established mandatory formula grants to states for the construction of community mental health centers.[466] However, the relevant appropriation of $50 million specified that the funds did not have to be spent until the end of fiscal year 1968 (the deferral here occurred in fiscal year 1967).[467] The administration therefore had discretion to defer the expenditures at issue. And as Budget Director Schultze noted in his Senate testimony, "with respect to deferrals, for example, in the case of the … HEW projects," "the money will be spent later."[468]

465 *Id.* at 71, https://tinyurl.com/5frpz5yt (where the line item is labeled as "Construction of community mental health centers, Public Health Service: Defer construction starts").
466 Pub. L. No. 88-164, §§ 200-07, 77 Stat. at 290-94, https://tinyurl.com/mt7w2bjf.
467 Pub. L. No. 89-787, 80 Stat. at 1392, https://tinyurl.com/yckd9w8f.
468 Schultze Senate Testimony at 67, 114, https://tinyurl.com/ydkwkr3c.

Lyndon Johnson

1966

ELEMENTARY AND SECONDARY EDUCATION ACT PROGRAMS

SEE INDIVIDUAL ANALYSIS BELOW

ALLEGED IMPOUNDMENT

According to CRA, "Johnson also impounded funding for … elementary and secondary education."[469]

ASSESSMENT

Two reductions in this category are analyzed individually below. Both appear to be authorized by statute.

In 1966, due to concerns about inflation, Johnson decided that he needed to take steps to reduce government spending. In a special message to Congress, he estimated that about $3 billion in reductions would be needed "in that limited portion of the fiscal 1967 budget under direct Presidential control."[470]

One of the areas Johnson targeted for reductions was elementary and secondary education. In a press conference, Johnson announced that there would be "$530 million in program reductions" amounting to "$395 million in expenditur[e]" reductions for "[e]lementary and secondary education."[471]

In early 1967, his budget director, Charles Schultze, gave testimony to both the House Ways and Means Committee and the Senate Appropriations Committee detailing the reductions.[472] The vast majority of them ($410 million in expenditures) were listed in a table (Table 2) entitled "[i]ncreased congressional authorizations for which we do not plan to request 1967 appropriations."[473] Because that table reflects only a decision not to request appropriations, and not the deferral or unilateral cutting of enacted appropriations, this "reduction" was not an impoundment.

However, Schultze's Table 3 lists two actual reductions within the HEW appropriation, under the heading "Elementary and secondary education activities," each of which exceeds $10 million.[474] As discussed below, both reductions appear to be deferrals rather than permanent cuts. And Johnson announced in March 1967 that the majority of those deferred funds had been released prior to the end of the fiscal year.[475]

469 CRA History at 18, https://tinyurl.com/35zkwp4z.

470 Special Message to the Congress on Fiscal Policy, *supra*, https://tinyurl.com/4njm2k2x. Johnson later explained in a news conference that the administration intended to make a $5.3 billion "budgetary cutback" to achieve a $3 billion reduction in actual federal expenditures for the remaining seven months of fiscal year 1967 (ending June 30, 1967). The President's News Conference of November 29, 1966, 2 Pub. Papers, *supra*, at 1406-07, https://tinyurl.com/bddfwhf9.

471 The President's News Conference of November 29, 1966, 2 Pub. Papers, *supra*, at 1410, https://tinyurl.com/bddfwhf9.

472 Schultze House Testimony at 8-29, https://tinyurl.com/y2y87vce; Schultze Senate Testimony at 61-78, https://tinyurl.com/3xdt648m.

473 Schultze Senate Testimony at 68, https://tinyurl.com/33tzcvew; *see* The President's News Conference of November 29, 1966, 2 Pub. Papers, *supra*, at 1410, https://tinyurl.com/bddfwhf9 ("I touched on that a moment ago, but this is largely increased congressional authorizations which we do not plan to fund. That should not be alarming to you because a good many of the Congressmen expected us to send up a supplementary after the authorization went to us. We didn't do it, so they are aware of that already, particularly in the education field.").

474 Schultze Senate Testimony at 70, https://tinyurl.com/ycx927he.

475 Statement by the President Announcing the Release of Deferred Funds for Federal Programs, 1 Pub. Papers, *supra*, at 357, https://tinyurl.com/44y32vuk.

Lyndon Johnson

1966

ESEA REDUCTION 1: EDUCATIONAL CENTERS

AUTHORIZED

ALLEGED IMPOUNDMENT

ESEA reduction #1: $18.2 million reduction in expenditures for supplementary educational centers and services due to deferral of new project grants[476]

ASSESSMENT

This impoundment was **likely authorized by statute**. Title III of the Elementary and Secondary Education Act of 1965 (ESEA) provided for grants to local educational agencies (subject to the submission and approval of applications meeting program requirements) to fund "supplementary education centers and services" out of appropriated sums apportioned among the states according to a prescribed formula.[477] The commissioner of education was given discretion to make grant payments for approved projects in advance, in installments, or by way of reimbursement.[478] The Supplemental Appropriations Act, 1967, allocated $145,000,000 for these grants.[479] Because this "cutback" involved only a deferral of new project grants and, as noted above, Schultze testified that where expenditures at HEW were deferred "the money [would] be spent later" in the year while the funds "remain available,"[480] the administration likely acted within the scope of its discretion under the statute.

476 Schultze Senate Testimony at 70, https://tinyurl.com/bdd459h4 (where the line item is labeled as "Elementary and secondary education activities, Title 3 supplementary centers and services: Defer new project[ ] grants until later in year").
477 Pub. L. No. 89-10, §§ 301-06, 79 Stat. 27, 39-43 (1965), https://tinyurl.com/5n86epvr (as amended).
478 *Id.* § 305(b), 79 Stat. at 43.
479 Pub. L. No. 89-697, 80 Stat. at 1061, https://tinyurl.com/5n98cwrj.
480 Schultze Senate Testimony at 67, 70, 114, https://tinyurl.com/bdd459h4.

Lyndon Johnson

1966

ESEA REDUCTION 2: EDUCATION GRANT FUNDS

AUTHORIZED

ALLEGED IMPOUNDMENT

ESEA reduction #2: $34 million reduction in expenditures due to postponing reallocation of grant funds for education of disadvantaged children[481]

ASSESSMENT

This impoundment was **likely authorized by statute**. Title I of ESEA provided for grants to eligible state and local educational agencies (upon the submission and approval of applications complying with program requirements) to meet the educational needs of children from low-income families (or otherwise disadvantaged), to be funded out of appropriated sums apportioned among the states according to a prescribed formula.[482] The Supplemental Appropriations Act, 1967, allocated approximately $1.1 billion for these grants.[483]

481 *Id.* at 70, https://tinyurl.com/bdd459h4 (where the line item is labeled as "Elementary and secondary education activities, Title 1: education of disadvantaged: Stop reallocation of formula grants").
482 Pub. L. No. 89-10, 79 Stat. at 27-36, https://tinyurl.com/436stwus (adding new Title II to Pub. L. No. 81-874, 64 Stat. 1100 (1950), https://tinyurl.com/2s38xur9); Pub. L. No. 89-313, § 6, 79 Stat. 1158, 1161-62 (1965), https://tinyurl.com/5apw3dzr (amending Pub. L. No. 81-874); Pub. L. No. 89-750, tit. I, pt. A, 80 Stat. 1191, 1191-99 (1966), https://tinyurl.com/yc9jhbkz (same) (at the time codified at 20 U.S.C. §§ 241a-241l).
483 Pub. L. No. 89-697, 80 Stat. at 1061, https://tinyurl.com/5n98cwrj.

To partially offset shortfalls in appropriated funds, the statute provided that the excess of a state's total grant eligibility over the amount for which applications in the state had been approved was to be made available to local agencies, first in that state, and then in others, experiencing a shortfall. The statute did not specify, however, when or how quickly the commissioner of education must execute this reallocation of excess available funds.[484]

Thus, the halt in "reallocation of [Title I] formula grants" appears to have been a reference to a pause in an ongoing reallotment of grant funds from states that had been allocated funds in excess of their needs. Because this "cutback" involved only a deferral in making funds available; because, as noted above, Schultze testified that where expenditures at HEW were deferred, "the money [would] be spent later" in the year while the funds "remain available";[485] and because the statute did not prescribe at what point in the fiscal year the reallocation of funds must occur, the administration likely acted within the scope of its statutory discretion.

484 Pub. L. No. 89-750, § 114(b), 80 Stat. at 1197 (at the time codified at 20 U.S.C. § 241h).
485 Schultze Senate Testimony at 67, 70, 114 https://tinyurl.com/ydkwkr3c.

Protect Democracy is a nonpartisan nonprofit organization dedicated to preventing American democracy from declining into a more authoritarian form of government.

protectdemocracy.org